

## CORPORATE REPRESENTATIVE DEPOSITIONS REVISITED\*

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As counsel for a corporation (“Corp”), you receive a notice naming one of the corporation’s employees, a mid-level industrial hygienist, to be deposed as a corporate representative. The notice states that the opposing party will take the deposition of “John Smith, to be deposed as the corporate representative of your client having the most personal knowledge of the following: (1) plaintiff’s exposure to benzene at its Black Rock Refinery, (2) the corporation’s industrial hygiene program during the years 1950-1990, and (3) other related subjects.” In an effort to cooperate in discovery, you produce John Smith to testify as a corporate representative because he is in fact a current employee familiar with the company’s operations, even though his knowledge is limited to the period of time he worked at the refinery, from 1980 to 1985. You designate him to testify only as to the company’s industrial hygiene program during the period of 1980 to 1985.

During the deposition, plaintiff’s counsel freely intermingles questions about the industrial hygiene program during the period of 1980 to 1985 with questions covered by the corporate representative deposition notice as to which Mr. Smith was not designated, other matters totally outside the scope of the notice, about which Mr. Smith has only limited knowledge, and other areas of which his “knowledge” is based only on hearsay. Mr. Smith admits, in answer to questions posed to him, that he has no knowledge of any respiratory protection program in use by Corp during the years from 1950 to 1975. You have information that indicates that a respiratory protection program in fact existed during those years, but Mr.

Smith was not involved and did not know of the program. You object to questions beyond the scope of Mr. Smith's designation as a corporate representative and instruct him not to answer any further related questions. A confrontation with opposing counsel over your right to instruct the witness ensues, with both sides declaring their intent to "see the judge about this." Nonetheless, following the deposition, plaintiff moves for summary judgment on his claim alleging an unsafe workplace, arguing that the corporate representative admitted that Corp had no evidence of any respiratory protection program during the critical years of 1950 through 1975. When you try to offer an affidavit demonstrating the scope of the respiratory protection program during the years in question, plaintiff moves to strike. The court grants the motion to strike, finds no controverting evidence to plaintiff's citations to the deposition of your corporate representative, and enters a partial summary judgment on that issue.

What went wrong? Was the notice proper to start with? If not, what could have been done differently?

The answers to these and other questions are relatively clear under the Federal Rules. Since most state corporate representative deposition rules are based on the Federal Rules,<sup>1</sup> this article will focus on the Federal Rules and what the answers to these questions are under those rules, address the purpose of the procedure adopted by the Rules and the uses for and limitations on the procedures, and suggest ways in which corporations can deal with attempts by interrogating parties to take unfair advantage of the process.<sup>2</sup>

## I. CORPORATE REPRESENTATIVE DEPOSITIONS—THE THEORY

Representative depositions under Rule 30(b)(6) of the Federal Rules of Civil Procedure have received increased attention as limitations on the

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<sup>1</sup>To date, only North Dakota has adopted the current version of Federal Rule of Civil Procedure 30(b)(6) verbatim. N.D.R. CIV. P. 30(b)(6). Kansas and Montana have adopted rules that are very similar to the current Federal Rule. KAN. STAT. ANN. § 60-230(b)(6) (West Supp. 2012) (omitting a comma after "governmental agency" and replacing "these rules" with "the rules of civil procedure," but otherwise identical to the Federal Rule); MONT. R. CIV. P. 30(b)(6) (West 2011) (omitting "other entit[ies]," but otherwise identical to the Federal Rule). The majority of states and the District of Columbia have adopted the pre-2007 version of the Federal Rule or some variation on it.

<sup>2</sup>Citations to the Texas Rules of Civil Procedure are offered as an example of differences between federal and state procedures.

number of interrogatories<sup>3</sup> and the number and length of depositions<sup>4</sup> have been imposed by state, federal and local rules.<sup>5</sup> At one time Rule 30(b)(6) was referred to as the “forgotten rule.”<sup>6</sup> No longer. According to one article, the rise in the use of corporate representative depositions has been driven by ill-advised interpretations of the Rule by courts that have promoted the unsuited abuse of the Rule to create oral contention interrogatories in the form of an “impromptu oral examination to questions that require [the corporation’s] designated witness to ‘state all support and theories’ for myriad contentions in a complex case.”<sup>7</sup> This has forced the “creation of a witness who will synthesize all facts and issues in the case” transforming the once “Forgotten Rule” into a potent opportunity for abuse.<sup>8</sup>

Federal Rule 30(b)(6) was adopted to strike a balance between the needs of those seeking discovery from corporations and the needs of the corporation itself.<sup>9</sup> The Rule protected the discovering party from “bandying” about by corporate witnesses who might each deny personal knowledge of information that was in fact known or reasonably available to the corporation as a whole.<sup>10</sup> At the same time, Rule 30(b)(6) was designed to provide relief to corporations from the taking of multiple depositions of its officers and agents as discovering parties took shots in the dark trying to identify witnesses and obtain information.<sup>11</sup> Rule 30(b)(6) also gave

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<sup>3</sup> See FED. R. CIV. P. 33(a).

<sup>4</sup> See FED. R. CIV. P. 30(a)(2), (d)(1).

<sup>5</sup> See generally Bradley M. Elbein, *How Rule 30(b)(6) Became a Trojan Horse: A Proposal For a Change*, 46 FED’N INS. & CORP. COUNS. Q. 365 (1996).

<sup>6</sup> See Mark A. Cymrot, *The Forgotten Rule*, LITIG., Spring 1992, at 6.

<sup>7</sup> Kent Sinclair & Roger P. Fendrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms*, 50 ALA. L. REV. 651, 651–53 (1999) (stating that the number of reported decisions discussing the Rule has increased four-fold since 1988 alone).

<sup>8</sup> *Id.* at 652–53.

<sup>9</sup> FED. R. CIV. P. 30 advisory committee’s notes [hereinafter *Rule 30 Notes*] (“[Rule 30(b)(6)] will curb the ‘bandying’ by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it.”); see also *FDIC v. Butcher*, 116 F.R.D. 196, 199 (E.D. Tenn. 1986), *aff’d by*, 116 F.R.D. 203 (E.D. Tenn. 1987) (stating the intent of Rule 30(b)(6) is to “curb any temptation a [litigant] might have to shunt a discovering party from ‘pillar to post’”); 8A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2103 (2d ed. 1994).

<sup>10</sup> *Rule 30 Notes*, *supra* note 9, § (b)(6).

<sup>11</sup> *United States v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996), *aff’d by*, 166 F.R.D. 367 (M.D.N.C. 1996).

corporations the ability to designate the person to be deposed rather than being compelled to live with the person selected by their opponent.<sup>12</sup>

Although corporations initially took much solace in the new rule, for the reasons discussed below, they should now recognize the “gift” as a Trojan Horse.<sup>13</sup> As interpreted by the courts, Federal Rule 30(b)(6) has become a powerful and one-sided weapon that can be abused by the interrogating party to the prejudice of the corporation. According to one court, the unequal burden placed on corporations is the price they pay for being allowed to conduct business through the corporate form.<sup>14</sup> That price is high.

## II. DEPOSITIONS UNDER RULE 30(B)(6) GENERALLY

Prior to the adoption of the representative deposition, it was necessary for a party seeking deposition testimony from an organization, be it a corporation, partnership, association, or governmental body,<sup>15</sup> to designate in its notice of deposition or subpoena, precisely the person to be deposed.<sup>16</sup> The corporation was under no obligation to help the interrogating party determine which of its various agents, employees, officers or managing directors had the information being sought. The result was what Professor Moore labeled a “wasteful charade” in which repeated shots in the dark were fired until the appropriate target was located.<sup>17</sup> In 1970, the federal

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<sup>12</sup> *Id.*

<sup>13</sup> See generally Elbein, *supra* note 5.

<sup>14</sup> *Taylor*, 166 F.R.D. at 362.

<sup>15</sup> Since the principal focus of this discussion is corporate representative depositions, references will principally be to that form of organization. However, the rules and comments apply equally to many forms of “organizations.” See FED. R. CIV. P. 30 (b)(6). As noted in the Comments to the 2007 Amendments to the Rule, the purpose behind adding:

‘other entity’ . . . to the list of organizations that may be named as deponent . . . [was] to ensure that the deposition process can be used to reach information known or reasonably available to an organization no matter what abstract fictive concept is used to describe the organization. Nothing is gained by wrangling over the place to fit into current rule language such entities as limited liability companies, limited partnerships, business trusts, more exotic common-law creations, or forms developed in other countries.

*Rule 30 Notes*, *supra* note 9, § (b)(6).

<sup>16</sup> 7 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 30.25[1] (3d ed. 2002); *Hosp. Corp. of Am. v. Farrar*, 733 S.W.2d 393, 394–95 (Tex. App.—Fort Worth 1987, no writ).

<sup>17</sup> MOORE ET AL., *supra* note 16, § 30.25[1].

courts sought to remedy this problem by adopting Federal Rule 30(b)(6).<sup>18</sup> That Rule provides that once the interrogating party has named a corporation, partnership, association, or governmental agency as the deponent, and described with reasonable particularity the subject matters on which testimony is sought, the organization must then designate one or more representatives to answer questions on the identified subject matters.<sup>19</sup>

The advisory committee's notes to the Federal Rules describe the intended purpose of the new procedure:

It will reduce the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a "managing agent." It will curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. The provisions should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge. Some courts have held that under the existing rules a corporation should not be burdened with choosing which person is to appear for it. This burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that of an examining party ignorant of who in the corporation has knowledge.<sup>20</sup>

As revised in 2007, Rule 30(b)(6) now reads:

In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf;

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<sup>18</sup> *Taylor*, 166 F.R.D. at 360; *Rule 30 Notes*, *supra* note 9, § (b)(6); *Farrar*, 733 S.W.2d at 394–95.

<sup>19</sup> FED. R. CIV. P. 30(b)(6).

<sup>20</sup> *Rule 30 Notes*, *supra* note 9, § (b)(6) (citations omitted); *see also* *Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 729 (D. Mass. 1985).



and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.<sup>21</sup>

The majority of courts recognize the availability of the procedure as to both party and non-party corporations.<sup>22</sup> The language of the Rule itself would seem to leave little room for argument on that question—although there has obviously been such.<sup>23</sup> Depositions of non-party corporations in federal proceedings are conducted under Rule 30(b)(6), although attendance can only be compelled by subpoena issued under Federal Rule 45.<sup>24</sup>

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<sup>21</sup>FED. R. CIV. P. 30(b)(6). The Comments to the 2007 Amendments to the Rule note that “The language of Rule 30 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.” Specifically with regard to Rule 30(b)(6), the Comments observe that:

‘[O]ther entity’ is added to the list of organizations that may be named as deponent. The purpose is to ensure that the deposition process can be used to reach information known or reasonably available to an organization no matter what abstract fictive concept is used to describe the organization. Nothing is gained by wrangling over the place to fit into current rule language such entities as limited liability companies, limited partnerships, business trusts, more exotic common-law creations, or forms developed in other countries.”

*Rule 30 Notes*, *supra* note 9, § (b)(6).

<sup>22</sup>9 MOORE ET AL., *supra* note 16, § 45.03[4]; 8A WRIGHT ET AL., *supra* note 9, § 2103; *but see* Donoghue v. County of Orange, 848 F.2d 926, 932 (9th Cir. 1988) (“We have discovered no authority . . . for the proposition that Rule 30 standards should govern Rule 45 subpoenas of witnesses” in representative depositions). Many state courts, however, have not yet had an opportunity to construe the federal or state rules governing corporate representative depositions, at least not as would be reflected in published opinions. *See, e.g.*, David A. Wollin & Geoffrey W. Millsom, *Everything You Always Wanted to Know About Depositions: but your client could not afford to research*, 50 R.I. B.J. 5, 34 (2002) (noting as late as 2002 that “[t]he Rhode Island Supreme Court has not had an opportunity to construe [Rule 30(b)(6)],” which is still true as of February 2013). In still other states, such as Texas, the case law is sparse or almost nonexistent.

<sup>23</sup>According to Rule 30(b)(6), “In its notice or subpoena, a party may name as the deponent a public or private corporation. . . . A subpoena must advise a nonparty organization of its duty to make this designation [that being a witness to testify on its behalf].” FED. R. CIV. P. 30(b)(6); *but see* Donoghue v. County of Orange, 848 F.2d 926, 932 (9th Cir. 1988).

<sup>24</sup>8A WRIGHT ET AL., *supra* note 9, § 2103.

A corporate representative in an action pending in federal court is generally entitled to be deposed at the corporation's principal place of business,<sup>25</sup> subject to the discretion of the court to order that the deposition be taken elsewhere under FED. R. CIV. P. 26(c).<sup>26</sup>

Rule 30(b)(6) does not require that the producing party disclose in advance who will appear to testify or with regard to which subjects although the Rule allows a corporation to designate which of its corporate representatives will testify on which designated subjects.<sup>27</sup> In fact, it has been held under the Federal Rule that the production of the representative for deposition constitutes sufficient "designation."<sup>28</sup> At least one state, however, expressly requires that the corporation, "a reasonable time before

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<sup>25</sup> See *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *Oubre v. Entergy Operations, Inc.*, No. CIV. A. 95-3168, 1999 WL 143093, at \*2 (E.D. La. Mar. 12, 1999) (involving non-party corporation with headquarters in New York that designated an employee resident in Miami as corporate representative, who was allowed to testify in Miami as requested by witness despite the fact that case pending, defendant contracted for and services at issue received in New Orleans); 7 MOORE ET AL., *supra* note 16, §§ 30.20[1][b][ii], 30.25[2]; 8A WRIGHT ET AL., *supra* note 10, § 2112.

<sup>26</sup> Rule 26(c) states:

A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following . . . (B) specifying terms, including time and place, for the disclosure or discovery . . . .

FED. R. CIV. P. 26(c); *see, e.g.*, *Custom Form Mfg., Inc. v. Omron Corp.*, 196 F.R.D. 333, 336 (N.D. Ind. 2000) (stating that where foreign corporation has done business in U.S., is subject to court's jurisdiction, and has taken advantage of federal discovery rules, exceptions are often made to general rule that depositions of corporation through its agents are to be taken at the corporation's principal place of business); *M & C Corp. v. Erwin Behr GMBH & Co.*, 165 F.R.D. 65, 67 (E.D. Mich. 1996) (explaining the general rule under FED. R. CIV. P. 30(b)(6) that corporate officers should be deposed at the corporation's principal place of business is subject to the discretion of the trial court); *Sugarhill Records Ltd. v. Motown Record Corp.*, 105 F.R.D. 166, 171 (S.D.N.Y. 1985) (stating the general rule that corporate defendants are deposed at the location of their principal place of business is subject to modification at the discretion of the trial court); *see also* 7 MOORE ET AL., *supra* note 16, §§ 30.20[1][b][iii], 30.25[2]; 8A WRIGHT ET AL., *supra* note 9, § 2112.

<sup>27</sup> FED. R. CIV. P. 30(b)(6) ("The named organization . . . may set out the matters on which each person designated will testify.").

<sup>28</sup> *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, No. 6:92CV00592, 1996 WL 575946, at \*6 (M.D.N.C. Sept. 6, 1996).

the deposition—designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify.”<sup>29</sup>

Another area in which the state rules may differ from the Federal Rule is explained more in the Notes and Comments to the Federal Rules than in the Rule itself.<sup>30</sup> Corporate representative depositions in federal cases count as only a single deposition for purposes of the ten deposition limit imposed by Federal Rule 30(a)(2)(A), no matter how many corporate representatives are produced,<sup>31</sup> but each such corporate representative deposition is treated as a separate deposition for purposes of Rule 30(d)(1)’s seven hour limitation.<sup>32</sup> As Professor Albright observed, “it may be in the organization’s interest to ‘educate’ one or two representatives on all or most of the matters listed in the deposition notice to avoid producing multiple witnesses for deposition and thereby increasing the allotted time.”<sup>33</sup>

Whether a single notice listing multiple and possibly unconnected subject matters or even multiple Rule 30(b)(6) notices will also be counted as but a single deposition under Federal Rule 30(b)(6) is unclear. While the Federal Rule logically prevents corporate parties from unfairly using up another party’s limited number of depositions by unnecessarily dividing its responses up among a number of representatives, it would seem equally logical that there should be some limit to the number of depositions an interrogating party can take at virtually no charge. While Federal Rules 26(b)(1) & (2) and 30(d)(2) & (3) provide a remedy for abuse, they put the burden entirely on the producing party.<sup>34</sup> To avoid an unreasonable burden on a corporation, at least separate 30(b)(6) notices should be treated as separate depositions for purposes of Rule 30(a)(2)(A)’s total number of depositions. By analogy to the Federal Rules regarding interrogatories, in extreme cases, one might argue that corporate representative deposition

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<sup>29</sup>TEX. R. CIV. P. 199.2(b)(1).

<sup>30</sup> See *Rule 30 Notes*, *supra* note 10, § (b)(6).

<sup>31</sup> See *id.* at § (a)(2)(A); see also 7 MOORE, *supra* note 16, § 30.25[1].

<sup>32</sup> See *Rule 30 Notes*, *supra* note 9, § (d)(2).

<sup>33</sup>ALEX W. ALBRIGHT ET AL., TEXAS PRACTICE SERIES, HANDBOOK ON TEXAS DISCOVERY PRACTICE § 13.5 (2002).

<sup>34</sup> See FED. R. CIV. P. 26(b)(1), (2), 30(d)(2), (3).

notices containing multiple discrete subject matters should be treated as separate notices.<sup>35</sup>

### III. ALTERNATIVE MEANS FOR DEPOSING CORPORATIONS

Federal Rules 30(b)(1) and (6) and 31(a) provide other means of deposing a corporation: depositions of officers, directors, and managing agents and depositions on written interrogatories.<sup>36</sup> Depositions on written interrogatories under Federal Rule 31(a)(3) are beyond the scope of this article.

#### A. Corporate Depositions Under Rule 30(b)(1)

##### 1. Officer, Director and Managing Agent Depositions

True corporate representative depositions must be distinguished from depositions of corporate officers, directors, and managing agents under Federal Rule 30(b)(1). Federal Rule 30(b)(6) expressly states that the procedure provided thereby does not preclude taking a deposition by any other procedure allowed by the Rules.<sup>37</sup> An interrogating party may still identify a specific corporate officer, director or managing agent to testify on behalf of a corporation under Federal Rule 30(b)(1), but it must so indicate in its notice that the person named will be expected to testify on behalf of the corporation.<sup>38</sup>

##### 2. Rule 30(b)(1) and Rule 30(b)(6) Depositions Present Different Obstacles and Different Benefits

As will be seen from the discussion that follows, there is much confusion between the procedures provided by Federal Rules 30(b)(1) and 30(b)(6), demonstrated by attempts to combine the procedures under a

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<sup>35</sup> See, e.g., FED. R. CIV. P. 33(a) (“[A] party may serve on any other party no more than 25 written interrogatories, including all discrete subparts.”); TEX. R. CIV. P. 190.2(c)(3), 190.3(b)(3) (“Each discrete subpart of an interrogatory is considered a separate interrogatory.”).

<sup>36</sup> 8A WRIGHT ET AL., *supra* note 9, § 2103. See also TEX. R. CIV. P. 199.2(b)(1) and 200.1(a).

<sup>37</sup> *Rule 30 Notes*, *supra* note 9, § (b)(6) (“This procedure supplements the existing practice whereby the examining party designates the corporate official to be deposed. Thus, if the examining party believes that certain officials who have not testified pursuant to this subdivision have added information, he may depose them.”).

<sup>38</sup> 7 MOORE ET AL., *supra* note 16, § 30.25[1]; 8A WRIGHT ET AL., *supra* note 9, § 2103.

notice which directs the corporation to produce a given witness as its corporate representative under Rule 30(b)(6).<sup>39</sup>

Under Federal Rule 30(b)(1), an interrogating party can take a corporation's deposition through the officer, director, or managing agent chosen by the interrogating party.<sup>40</sup> If the opposing party identifies a weak link in the organization, that party can exploit it through the deposition. On the other hand, when one notices the deposition of a specific officer, director, or managing agent under Federal Rule 30(b)(1), the interrogating party is limited to facts known to the witness.<sup>41</sup> If the corporation knows particular information, but the 30(b)(1) witness does not, the deposition will have been a waste. The deposition also will have used up one of the limited number of depositions available to the interrogating party under Federal Rules 30(a)(2)(A) or 31(a)(2)(A).<sup>42</sup> In this regard, Rule 30(b)(1) depositions are still subject to the "wasteful charade" described by Professor Moore.<sup>43</sup> On the other hand, under the Federal Rules, true 30(b)(6) depositions count as only one deposition under the ten deposition limit of Federal Rule 30(a)(2)(A), no matter how many representatives the corporation chooses to designate to testify on the subjects specified.<sup>44</sup> One must be careful what one wishes for under Federal Rule 30(b)(1).

### 3. Rule 30(b)(1) Testimony is Considered to be That of the Corporation

Federal Rule 32(a)(3) provides that testimony of an officer, director, or managing agent, like that of a designated representative under Rule 30(b)(6), is admissible against the corporation for any purpose, just as if the witness were a party himself.<sup>45</sup> For example, the deposition of a corporate officer, director, or managing agent under Federal Rule 30(b)(1), or

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<sup>39</sup> See *infra* Part IV.C.1.

<sup>40</sup> FED. R. CIV. P. 30(b)(1).

<sup>41</sup> See Sinclair & Fendrich, *supra* note 7, at 703.

<sup>42</sup> See FED. R. CIV. P. 30(a)(2)(A), 31(a)(2)(A).

<sup>43</sup> 7 MOORE ET AL., *supra* note 16, § 30.25[1].

<sup>44</sup> See *Rule 30 Notes*, *supra* note 9, § (a)(2)(A) ("A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify."); 7 MOORE ET AL., *supra* note 16, § 30.25[1].

<sup>45</sup> FED. R. CIV. P. 32(a)(3) ("An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4) [depositions upon written interrogatory]."); see also 7 MOORE ET AL., *supra* note 16, §§ 30.03[2], 32.21[2][a]; 8A WRIGHT ET AL., *supra* note 9, § 2103.

someone designated under Federal Rule 30(b)(6) to testify on behalf of the corporation, can be used even if the witness is present in the courtroom. The testimony of an ordinary witness can only be used if the requirements of Rule 32(a)(4) are met, such as the witness is outside of subpoena range.<sup>46</sup> The Rules of Evidence provide other consequences, imputing such testimony to a party under Federal Rules 30(b)(1) and 30(b)(6).<sup>47</sup>

Corporations are also said to be “bound” by the testimony of their Rule 30(b)(6) representatives as well as that of their officers, directors, and managing agents.<sup>48</sup> Thus, it has been held that a corporation is not allowed to defeat a motion for summary judgment based upon an affidavit that conflicts with admissions made in its Rule 30(b)(6) deposition.<sup>49</sup> Part IV.E.1, *infra*, discusses in detail what it means for a corporation to be “bound” by such testimony.

A Rule 30(b)(1) corporate representative selected by the opposing party can be particularly dangerous if the witness is inclined to testify about things the witness really knows nothing about. Since the witness testifies as if he himself were a party, his admissions, whether or not based on personal knowledge, are admissible against the corporate party.<sup>50</sup>

#### 4. Not All Employees Are Treated as if They Were the Corporation Itself

A difference exists between deposing a corporation’s officers, directors, or managing agents and its ordinary employees under Federal Rule 30(b)(1). A corporation is subject to sanctions when its designated

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<sup>46</sup> FED. R. CIV. P. 32(a)(4)(B); 8A WRIGHT ET AL., *supra* note 9, § 2145, at 169–70.

<sup>47</sup> *See, e.g.*, FED. R. EVID. 801(d)(2).

<sup>48</sup> *See* Hyde v. Stanley Tools, 107 F. Supp. 2d 992, 993 (E.D. La. 2000).

<sup>49</sup> *Id.* (explaining that where corporate representative admitted that allegedly defective tool was manufactured by defendant, corporation could not later contradict that testimony through another witness in order to defeat summary judgment, absent some excuse for change in position); *but see* Indus. Hard Chrome, Ltd. v. Hetran, Inc., 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000) (denying plaintiff’s motion *in limine* to exclude evidence contradicting testimony given during defendant’s Rule 30(b)(6) deposition on grounds that while the corporation was bound by Rule 30(b)(6) testimony, such does not constitute a judicial admission, and like any other deposition testimony can be contradicted and used for impeachment purposes); W.R. Grace & Co. v. Viskase Corp., No. 90 C 5383, 1991 WL 211647, at \*2 (N.D. Ill. Oct. 15, 1991) (allowing corporate party to offer evidence at trial contrary to statements made by its corporate representative in a Rule 30(b)(6) deposition).

<sup>50</sup> *See, e.g.*, FED. R. CIV. P. 32(a)(3).

representative fails to cooperate.<sup>51</sup> The same is true of an officer, director, or managing agent whose deposition has been noticed under Rule 30(b)(1), but not of an employee, other than one designated by the corporation in response to a notice under Rule 30(b)(6).<sup>52</sup> While the opposing party can compel the presence of an officer, director, or managing agent simply by the issuance of a notice, it would appear that under the Federal Rules, the attendance of an employee who does not fit within any of those categories may be compelled only upon the issuance of a subpoena, as with any other non-affiliated witness.<sup>53</sup> However, Professor Moore suggests that it might be possible to subpoena a deponent who is a corporate employee by serving the corporation.<sup>54</sup> This argument would have much more force in situations in which the corporation served was also a party in the lawsuit in which the subpoena was issued.

### 5. Corporate Witnesses Subject to Rule 30(b)(1)

Who is an officer or director of a corporation for purposes of deposition under Rule 30(b)(1), in which the deposing party imposes upon the corporation the duty to produce the witness that it has selected to testify on behalf of and to bind the corporation, does not present much opportunity for dispute. The same cannot be said for attempts by opposing parties to designate someone as a managing agent.

Who qualifies as a managing agent, such that an opposing party may select whose testimony will bind the responding corporation, is a much more intriguing question. The courts appear to follow a three to five prong test to determine whether a designated witness qualifies as a “managing agent.”<sup>55</sup> The elements of the test are:

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<sup>51</sup> See, e.g., FED. R. CIV. P. 37(d); TEX. R. CIV. P. 215.2(b)–(c) (Subsection (b) addresses parties while subsection (c) pertains to non-parties); 7 MOORE ET AL., *supra* note 16, § 30.25[3]; 8A WRIGHT ET AL., *supra* note 9, § 2103.

<sup>52</sup> See, e.g., 8A WRIGHT ET AL., *supra* note 9, § 2103.

<sup>53</sup> Sugarhill Records Ltd. v. Motown Record Corp., 105 F.R.D. 166, 169 (S.D.N.Y. 1985); 7 MOORE ET AL., *supra* note 16, § 30.03[2]; 8A WRIGHT ET AL., *supra* note 9, § 2103, at 36–38.

<sup>54</sup> See 7 MOORE ET AL., *supra* note 16, § 30.03[2] (referring apparently to the discussion in MOORE’S, *supra* note 16, § 45.21[1], which advocates that certain forms of non-in-hand delivery satisfy the policy underlying Rule 45, which requires only reasonable notice sufficient to satisfy the requirements of due process).

<sup>55</sup> 7 MOORE ET AL., *supra* note 16, § 30.03[2]; 8A WRIGHT ET AL., *supra* note 9, § 2103, at 40–41 n.28.

- (1). Does the individual possess general powers to exercise judgment and discretion in corporate matters;
- (2). Is the individual a person who can be relied on to give testimony, at the employer's request, in response to the demand of the deposing party;
- (3). Is the individual a person who can be expected to identify with the interests of the corporation;
- (4). Are there persons employed by the corporation in positions of higher authority than the designated deponent in the area for which information is sought; and
- (5). What are the general responsibilities of the individual with regard to the issues in the litigation?<sup>56</sup>

An interesting case on point is *Sanders v. Circle K Corp.*<sup>57</sup> There, plaintiff Sanders alleged that while working as an assistant manager in a Circle K store he was sexually harassed and discriminated against by Edmonds, the store manager, culminating in a physical attack and termination of Sanders' employment by Edmonds.<sup>58</sup> Sanders noticed the deposition of a corporate representative under Federal Rule 30(b)(6) to testify regarding: "the events that occurred on June 15, 1990 at the Circle K located at Thirty-sixth Street and Indian School Road in Phoenix, Arizona between the hours of 10:00 p.m. and 12:00 a.m., June 16, 1990, involving Clayton Sanders and Richard Edmonds."<sup>59</sup>

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<sup>56</sup> See, e.g., *In Re Honda Am. Motor Co.*, 168 F.R.D. 535, 540 (D. Md. 1996) (indicating that controlling factors include: whether the corporation has invested the person with discretion to exercise his judgment; whether the employee can be depended upon to carry out the employer's directions; and whether the individual can be expected to identify with the interests of the corporation as opposed to the interests of the adverse party); *Sugarhill Records*, 105 F.R.D. at 170 (explaining that factors which must be examined are: whether the individual is invested with general powers allowing him to exercise judgment and discretion in corporate matters; whether the individual can be relied upon to give testimony at his employer's request in response to the demand of the examining party; whether any person or persons are employed by the corporate employer in positions of higher authority than the individual designated in the area regarding which information is sought; and the general responsibilities of the individual respecting the matters involved in the litigation).

<sup>57</sup> See generally 137 F.R.D. 292 (D. Ariz. 1991).

<sup>58</sup> *Id.* at 293.

<sup>59</sup> *Id.*



Circle K produced the Phoenix Division Human Resources Manager who had investigated the incident.<sup>60</sup> Plaintiff moved to compel Circle K to designate Richard Edmonds as its corporate representative on the grounds that the Human Resources manager had no personal knowledge of the events in question and only Edmonds could give such testimony.<sup>61</sup> Circle K opposed, arguing that Edmonds was not an officer, director, or “managing agent” and therefore could not act as an appropriate spokesman on behalf of the corporation.<sup>62</sup> Circle K also sought sanctions for Sanders’s misapplication of Rule 30(b)(6).<sup>63</sup>

Although the deposition notice referred to Rule 30(b)(6) for its authority and did not attempt to name the intended deponent in the notice itself, the court approached the dispute from the perspective of Rule 30(b)(1) without discussing the differences between the two rules.<sup>64</sup> Unlike Rule 30(b)(1), depositions under Rule 30(b)(6) are not limited to officers, directors and managing agents but include any “other persons who consent to testify on [the corporation’s] behalf.”<sup>65</sup> Instead of addressing the issue of whether plaintiff could direct a Rule 30(b)(6) notice to a specific witness or whether he had a right to a corporate representative with personal knowledge, the court cut to the chase, analyzing whether plaintiff could have noticed Edmonds’ deposition under Rule 30(b)(1).<sup>66</sup> Since Edmonds clearly was not an officer or director of Circle K, that left the question of whether he qualified as a “managing agent.”<sup>67</sup> The court focused on only one of the five factors by which it tested the deponent’s suitability as a corporate representative: whether the individual is a person who can be expected to identify with the interests of the corporation.<sup>68</sup> The court held that Edmonds clearly did not qualify since his interests were directly adverse to those of Circle K.<sup>69</sup> The court noted that it was in Edmonds best interest to argue that all of his actions were within the course and scope of his employment

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 293–94.

<sup>62</sup> *Id.* at 294.

<sup>63</sup> *Id.*

<sup>64</sup> *See id.*

<sup>65</sup> FED. R. CIV. P. 30(b)(6).

<sup>66</sup> *See Sanders*, 137 F.R.D. at 294.

<sup>67</sup> *See id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

while Circle K's interests were to argue the opposite.<sup>70</sup> As noted by the court: "It would be contrary to the purpose of Rule 30(b)(6) to require Circle K to designate an individual as a corporate spokesperson who has interests diametrically opposed to those of the corporation."<sup>71</sup> The court granted Circle K's motion for sanctions for an inappropriate attempt to force it to accept such a hostile witness as its corporate representative.<sup>72</sup>

### B. Rule 30(b)(1) and "Apex" Depositions

As attractive as Rule 30(b)(1) depositions of senior corporate executives may be, abuse of the procedure can result in invocation of the "apex" doctrine. In *Salter v. Upjohn Co.*, the Fifth Circuit adopted limitations on a party's ability to conduct discovery of senior corporate managers in a Rule 30(b)(1) type deposition, which is properly aimed at witnesses who have knowledge of relevant facts.<sup>73</sup> The *Salter* court found that it was proper for a trial court to quash the notice of deposition of the defendant's president, requiring the plaintiff first to depose "other employees that [defendant] indicated had more knowledge of the facts . . . ."<sup>74</sup> Many other jurisdictions, including several federal courts, have adopted this doctrine.<sup>75</sup>

As one federal district court explained in interpreting *Salter*, this doctrine reflects the need to limit depositions of high-ranking corporate

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*; see discussion *infra* Part IV.C.1-2 (The court could have just as easily ruled that there is no right to require that the producing party designate a specific corporate representative or to produce a witness with personal knowledge under Rule 30(b)(6). Thus, the court treated the notice as if it had been issued under Rule 30(b)(1) rather than 30(b)(6)).

<sup>73</sup> 593 F.2d 649, 651 (5th Cir. 1979).

<sup>74</sup> *Id.*

<sup>75</sup> *E.g.*, *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 127-28 (Tex. 1995); see also *Baine v. Gen. Motors Corp.*, 141 F.R.D. 332, 334-35 (M.D. Ala. 1991); *Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140, 144-46 (D. Mass. 1987); *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985); *Armstrong Cork Co. v. Niagara Mohawk Power Corp.*, 16 F.R.D. 389, 390 (S.D.N.Y. 1954); *M.A. Porazzi Co. v. The Mormaclark*, 16 F.R.D. 383, 383 (S.D.N.Y. 1951); *Liberty Mut. Ins. Co. v. Super. Ct.*, 13 Cal. Rptr. 2d 363, 366 (Cal. Ct. App. 1992); *Broadband Commc'ns, Inc. v. Home Box Office, Inc.*, 549 N.Y.S.2d 402, 402 (N.Y. App. Div. 1990). Not all courts agree, however. See, *e.g.*, *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607-08 (Mo. 2002) (en banc) (declining to adopt "apex" rule used in California and Texas, instead leaving depositions of top-level corporate officials to standard rules governing discovery but with very similar analysis).

officers, to avoid unnecessary harassment.<sup>76</sup> As to those depositions, upon objection by the corporation, the trial court should first require the party seeking the deposition to attempt to obtain the discovery through less intrusive methods, including for example, depositions of lower level employees, deposition of the corporate representative, and interrogatories and requests for production to the corporation.<sup>77</sup>

However, the “apex” doctrine does not create immunity from deposition for senior corporate officials. As the *Salter* court explained, “[i]t is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error.”<sup>78</sup> Proper application of the “apex” doctrine does not constitute a total prohibition on the deposition in question, but is no more than an exercise of “the broad discretion that . . . [the trial court] has in controlling the timing of discovery.”<sup>79</sup>

Thus, while under Federal Rule 30(b)(1), a deposition of an officer, director, or managing agent of a corporation can be taken to obtain testimony that will “bind” the corporation. Because the witness is not required to do anything other than testify from personal knowledge, constraints have been placed on efforts to harass “corporate officer[s] at the apex of the corporate hierarchy.”<sup>80</sup>

#### IV. RIGHTS IN AND LIMITATIONS ON FEDERAL RULE 30(B)(6) DEPOSITIONS

##### A. *Duty of the Noticing Party*

###### 1. The Notice

Under Federal Rule 30(b)(6), the party seeking discovery from a corporation begins the process by issuing a notice of deposition in which

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<sup>76</sup>*Baine*, 141 F.R.D. at 335.

<sup>77</sup>*Id.*; see also *Garcia*, 904 S.W.2d at 128; *In re Daisy Mfg. Co.*, 17 S.W.3d 654, 656–57 (Tex. 2000) (per curiam); *Simon v. Bridewell*, 950 S.W.2d 439, 443 (Tex. App.—Waco 1997, writ dismissed).

<sup>78</sup>593 F.2d at 651.

<sup>79</sup>*Id.* (citing *Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976)).

<sup>80</sup>*Garcia*, 904 S.W.2d at 127–28.

the corporation is named as the deponent.<sup>81</sup> The notice alone is sufficient to trigger a duty to respond by a corporate party while a non-party corporation is entitled to require the issuance of a subpoena.<sup>82</sup> Under the Federal Rules, the notice must advise a non-party corporation of its duty to designate a representative to testify on its behalf.<sup>83</sup> None of this is particularly controversial. The notice to either a party or non-party corporation must, however, describe with reasonable particularity the subject matters on which the corporation is to testify.<sup>84</sup> This is where things get more interesting.

## 2. Reasonable Particularity

According to the District Court for the District of Columbia, there is no obligation on the part of the corporation to even designate a witness until the noticing party has “describ[ed] with reasonable particularity the matters on which examination is requested.”<sup>85</sup>

In *Bank of New York v. Meridien BIAO Bank Tanzania, Ltd.*, the parties brought cross-motions for sanctions arising out of a series of discovery disputes, two of which related to Rule 30(b)(6) depositions.<sup>86</sup> Defendant Deposit Insurance Board (DIB), as assignee for Meridien BIAO Bank, sought sanctions against the Bank of New York (BNY) for failure to comply with its request for discovery under Rule 30(b)(6).<sup>87</sup> The court noted that it was impossible to characterize DIB’s request for a witness as a Rule 30(b)(6) notice.<sup>88</sup> Instead, it found that the documents more resembled “informal requests between counsel . . . stat[ing] . . . its desire to discover” why various documents at issue in the case had not previously been

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<sup>81</sup>FED. R. CIV. P. 30(b)(6) (“In its notice or subpoena, a party may name as the deponent a public or private corporation . . . and must describe with reasonable particularity the matters for examination.”).

<sup>82</sup>7 MOORE ET AL., *supra* note 16, § 30.03[2]; 8A WRIGHT ET AL., *supra* note 9, § 2103.

<sup>83</sup>Federal Rule 30(b)(6) provides, *inter alia*: “[T]he named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf . . . . A subpoena must advise a nonparty organization of its duty to make this designation.” FED. R. CIV. P. 30(b)(6).

<sup>84</sup>*Id.*

<sup>85</sup>Alexander v. FBI, 186 F.R.D. 137, 139 (D.D.C. 1998) (quoting FED. R. CIV. P. 30(b)(6)).

<sup>86</sup>See generally 171 F.R.D. 135 (S.D.N.Y. 1997).

<sup>87</sup>*Id.* at 140–41 (The opinion does not quote the challenged language in the notice.).

<sup>88</sup>*Id.* at 145.

produced.<sup>89</sup> Thus, the court held that the producing party could not have violated Rule 30(b)(6) and sanctions would be improper.<sup>90</sup>

But how particular is “reasonably particular?” In *Reed v. Bennett*, plaintiff issued a Rule 30(b)(6) notice specifically listing the areas of inquiry but then added a dragnet provision stating that “the areas of inquiry will ‘includ[e], but not [be] limited to’ the areas specifically enumerated.”<sup>91</sup> The court held that such a notice subjected the noticed party to “an impossible task . . . . Where, as here, the defendant cannot identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible.”<sup>92</sup>

As stated by the District Court for the District of Minnesota, “to allow the Rule to effectively function, the requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute.”<sup>93</sup>

Courts interpret what constitutes “reasonable particularity” in the context of the case at issue. *Alexander v. FBI* is a case in point.<sup>94</sup> In *Alexander*, plaintiffs alleged that their privacy interests were violated when the FBI improperly handed over to the White House hundreds of FBI files of former political appointees and government employees, a dispute dubbed “Filegate.”<sup>95</sup> Plaintiffs named the Executive Office of the President (EOP) in their 30(b)(6) notice and described the subject matter of the deposition as “the computer systems commonly known as or referred to as ‘Big Brother’ and/or ‘WHODB.’”<sup>96</sup> Following the denial of EOP’s motion to quash the

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<sup>89</sup> *Id.* at 145–46.

<sup>90</sup> *Id.* at 146; *see also* *Doe v. Yorkville Plaza Assocs.*, No. 92 Civ. 8250(JGK)(RLE), 1996 U.S. Dist. LEXIS 8683, at \*20 (S.D.N.Y. June 20, 1996) (dealing with Fire Code requirements for residential buildings built in New York City from 1983 to date); *Hi-Plains Elevator Mach., Inc. v. Mo. Cereal Processors, Inc.*, 571 S.W.2d 273, 276 (Mo. Ct. App. 1978) (explaining that where notice to corporation did not contain adequate description of matters on which examination was to be conducted, corporation was under no duty to designate corporate representative to be examined); *Sinclair & Fendrich*, *supra* note 7, at 662 (explaining that subject listings that are overbroad are improper, listing cases).

<sup>91</sup> 193 F.R.D. 689, 692 (D. Kan. 2000).

<sup>92</sup> *Id.*

<sup>93</sup> *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000); *see also* *Alexander v. FBI*, 186 F.R.D. 137, 139-40 (D.D.C. 1998).

<sup>94</sup> 186 F.R.D. at 137.

<sup>95</sup> *Id.* at 138.

<sup>96</sup> *Id.* at 139 n.1 (“WHODB” was an acronym for White House Office Database.).

deposition, plaintiffs re-noticed the deposition using similar language.<sup>97</sup> Reminiscent of the 30(b)(6) notice in *Reed*, plaintiffs also sent a letter further designating seven specific areas for deposition, including Number 7, “other relevant testimony and testimony that may lead to relevant evidence.”<sup>98</sup> EOP produced a witness who was able to answer many, but not all questions posed.<sup>99</sup>

On plaintiffs’ motion to compel re-designation of an agency representative under Rule 30(b)(6), the court noted that the initial burden is on the noticing party to “describe with reasonable particularity the matters on which examination is requested.”<sup>100</sup> EOP argued that Rule 30(b)(6) looks only to the notice itself and that the notice was inadequate to “describe with reasonable particularity the matters on which examination is requested.”<sup>101</sup> EOP argued that because the original notice and plaintiffs’ re-notice merely stated that the subject of inquiry would be “the computer systems commonly known as or referred to as ‘Big Brother’ and/or ‘WHODB,’” the notice lacked “reasonable particularity.”<sup>102</sup> Given the breadth of item Number 7, and decisions such as *Reed*, that would seem to have been a valid argument.<sup>103</sup>

The court implicitly rejected EOP’s premise that the court and parties could look only to the four corners of the notice itself in determining whether the subject matter of the deposition had been described with reasonable particularity.<sup>104</sup> Instead, it found that EOP had sufficient notice based “[o]n the facts of this case,” referring to the fact that the parties had already argued the relevance under Rule 26(b)(1) of the information sought on EOP’s motion for a protective order.<sup>105</sup> Moreover, the court separately found that although the letter from plaintiffs’ counsel providing additional detail regarding the scope of the deposition did not fall within the four corners of the 30(b)(6) notice, EOP was clearly put on notice of the subject matters on which the witness would be expected to testify.<sup>106</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 140.

<sup>100</sup> *Id.* at 139.

<sup>101</sup> *Id.* at 140 (quoting FED. R. CIV. P. 30(b)(6)).

<sup>102</sup> *Id.*

<sup>103</sup> See *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000).

<sup>104</sup> *Alexander*, 186 F.R.D. at 139–40.

<sup>105</sup> *Id.* at 140.

<sup>106</sup> *Id.*

In a subsequently reported decision arising out of the same case, the district court allowed a number of very specific 30(b)(6) subject matter designations, with some being modified by the court.<sup>107</sup> However, the court drew the line with the notice seeking to have EOP designate a witness to testify regarding “any other matters relevant to this case, or which may lead to the discovery or relevant evidence.”<sup>108</sup> Such a vague designation did not comply with the Rule’s requirement of “reasonable particularity.”<sup>109</sup>

Thus, the court looked beyond the four corners of the 30(b)(6) notice to the prior motion to quash and to the letter from counsel, finding each by itself sufficient to describe the subject matter of the deposition with reasonable particularity.<sup>110</sup> Viewed in the abstract, the court’s decision does not seem unreasonable. However, in light of other decisions discussed below, the resultant ill-defined scope of the notice creates a trap for unwary corporate counsel.

### 3. Application to the Rule 30(b)(6) Notice to Corp

Thus, in the scenario postulated at the beginning of this discussion, the notice to Corp containing the global subject designation of “other related subjects,” without more, would not comply with the requirement of “reasonable particularity” and would have been subject to a motion to quash or for protection. Why such a motion is worth the trouble will become clear below.

#### *B. Rights of the Noticing Party*

##### 1. Does the Interrogating Party Have a Right to Exceed the Scope of the Subject Matters in the Rule 30(b)(6) Notice or the Scope of a Given Representative’s Designation?

In the example involving the deposition of Corp’s representative, the interrogating party exceeded both the scope of the notice and the scope of the designation of Mr. Smith. Does a party have a right to issue a notice that

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<sup>107</sup> *Alexander v. FBI*, 188 F.R.D. 111, 121 (D.D.C. 1998).

<sup>108</sup> *Id.* (quoting EOP’s motion for protective order in response to plaintiff’s deposition notice; Ex. A, at 3).

<sup>109</sup> *Id.*

<sup>110</sup> *Alexander*, 186 F.R.D. at 140; *see also* *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989) (explaining that plaintiff’s Rule 30(b)(6) notice was “subject to a prior clarifying letter so that defendant necessarily knew the scope and nature of plaintiff’s interest”).

describes the subjects of inquiry and then ignore his or her own notice? Does it have a right to ignore a limited designation by the corporation? There is a split in the authorities on this point, but clearly one rule is in the majority.

*a. Paparelli v. Prudential Insurance Co. of America*

In *Paparelli v. Prudential Insurance Co. of America*, counsel for plaintiff issued a Rule 30(b)(6) notice requiring defendant Westinghouse to produce a corporate representative to answer questions regarding the manner and system of keeping, maintaining, and indexing records which were the subject of an order to produce and the details of the search for such records conducted by defendant.<sup>111</sup> Plaintiff's counsel attempted to exceed the scope of the notice by questioning the witness about a "product letter" obtained from plaintiff's counsel in other litigation.<sup>112</sup> Defendant's counsel instructed the witness not to answer and a motion for sanctions followed.<sup>113</sup> Plaintiff contended that the notice created no limitation on the scope of the deposition, that examining counsel could ask a witness produced under Rule 30(b)(6) any question, and that the witness must answer any such question on behalf of the corporation, to the extent he was able to do so.<sup>114</sup>

The court held that although there is nothing in Rule 30(b)(6) explicitly limiting examination to the scope of the notice, such limitation is implied in the Rule.<sup>115</sup> The court observed that:

[T]he purpose of the rule was to afford the party deposing the corporation the ability to obtain information on certain matters in the form of testimony on behalf of the corporation without having to name the individual in the corporation to be deposed. It makes no sense for a party to state in a notice that it wishes to examine a representative of a corporation on certain matters, have the corporation designate the person most knowledgeable with respect to those matters, and then to ask the representative about

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<sup>111</sup> 108 F.R.D. 727, 728 (D. Mass. 1985).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 731.

<sup>114</sup> *Id.* at 729.

<sup>115</sup> *Id.*



matters totally different from the ones listed in the notice.<sup>116</sup>

Second, the court noted that another purpose of the Rule was to allow the corporation to designate a person who was prepared to answer questions involving specified matters on behalf of the corporation in order to avoid the situation in which the party noticed a particular person for deposition but the corporation had no way of knowing what matters were going to be inquired into or whether the designated person knew anything about the subject matter.<sup>117</sup> The court stated:

Obviously, this purpose . . . would be effectively thwarted if a party could ask a representative of a corporation produced pursuant to a Rule 30(b)(6) deposition notice to testify as to matters which are totally unrelated to the matters listed in the notice and upon which the representative is prepared to testify.<sup>118</sup>

Finally, the court noted that Rule 30(b)(6) requires that the notice must list the matters upon which examination is requested “with reasonable particularity.”<sup>119</sup> “If a party were free to ask any questions, even if ‘relevant’ to the lawsuit, which were completely outside the scope of the ‘matters on which examination is requested,’ the requirement that the matters be listed ‘with reasonable particularity’ would make no sense.”<sup>120</sup> Accordingly, the court held that “if a party opts to employ the procedures of [Federal Rule 30(b)(6)], to depose the representative of a corporation, that party must confine the examination to the matters stated ‘with reasonable particularity’ . . . in the Notice of Deposition.”<sup>121</sup> Nonetheless, the court also held that because no serious harm was presented by allowing the witness to answer the questions outside the scope of the notice, counsel had no right under Rule 30(c) to instruct the witness not to answer.<sup>122</sup> Instead, counsel should have either allowed the witness to answer subject to his objection or

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<sup>116</sup> *Id.* at 729–30.

<sup>117</sup> *Id.* at 730.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*; See also *Hoechst Celanese Corp. v. Nat’l Union Fire Ins. Co.*, 623 A.2d 1099, 1112–13 (Del. Super. Ct. 1991).

<sup>122</sup> *Paparelli*, 108 F.R.D. at 731.

should have terminated the deposition in order to seek an order of the court under Rule 30(d).<sup>123</sup>

*b. King v. Pratt & Whitney*

The opposite approach was taken by the Southern District of Florida in *King v. Pratt & Whitney*.<sup>124</sup> There again, an examining party sought to exceed the scope of three Rule 30(b)(6) notices it had issued.<sup>125</sup> The presenting party objected, terminated the deposition, and immediately sought a protective order to limit the scope of questioning to those areas described in the notices.<sup>126</sup> The District Court noted that counsel's challenge of questions outside the scope of the notice was "understandable" and that the proper procedure was followed by immediately seeking a protective order.<sup>127</sup> However, it disagreed with the conclusion of the *Paparelli* court, finding instead that Rule 30(b)(6) in no way limits the scope of a deposition.<sup>128</sup> The court noted that:

If the examining party asks questions outside the scope of the matters described in the notice, the general deposition rules govern (i.e., Federal Rule 26(b)(1)), so that relevant questions may be asked and no special protection is conferred on a deponent by virtue of the fact that the deposition was noticed under 30(b)(6).<sup>129</sup>

"[I]f the deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining

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<sup>123</sup> *Id.* (relying upon *Int'l Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp.*, 91 F.R.D. 277, 279–80 & n.4 (D.D.C. 1981) (explaining that the general rule under Federal Rule 30(c) is that depositions are taken subject to objections, not instructions; however, in exceptional situations, the witness may be instructed not to answer in order to preserve privilege, avoid disclosure of trade secrets or where other serious harm will likely result from responding to question)); *see also* *Detoy v. City & Cnty. of San Francisco*, 196 F.R.D. 362, 365–66 (N.D. Cal. 2000).

<sup>124</sup> *See generally* 161 F.R.D. 475 (S.D. Fla. 1995), *aff'd by*, 213 F.3d 646 (11th Cir. 2000) (unpublished table decision).

<sup>125</sup> *Id.* at 475.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 476.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

party's problem."<sup>130</sup> That is, the absence of information outside the scope of the notice will not prevent it from presenting evidence at trial on that subject as to "I do not know" answers within the scope of the notice.<sup>131</sup> The court specifically noted that: "This Court sees no harm in allowing all relevant questions to be asked at a Rule 30(b)(6) deposition or any incentive for an examining party to somehow abuse this process."<sup>132</sup> Professor Moore considers this to be the better rule.<sup>133</sup>

Similarly, the District Court for the District of Columbia saw no reason why a corporate representative deposed under Rule 30(b)(6) should be immune to questioning beyond the scope of the notice when ordinary witnesses are subject to questioning on any subject that could lead to the discovery of admissible evidence under Federal Rule 26(b)(1).<sup>134</sup> As the court noted in *Overseas Private Investment Corp. v. Mandelbaum*, "if the corporate deponent has no knowledge about a particular topic, he need only say so. Continued pursuits into areas where the deponent has no knowledge can be stopped by the issuance of protective orders."<sup>135</sup> The court noted that once a witness has been designated, he is subject to unlimited inquiry about information known to him, even if it relates to topics designated in the Rule 30(b)(6) notice, but as to which the particular corporate representative had not been designated to testify.<sup>136</sup>

While promoting efficiency, this approach ignores the fact that the testimony of ordinary witnesses does not bind the corporation. Nor does testimony of an ordinary fact witness prevent a corporation from presenting contradicting testimony to defeat a motion for summary judgment as occurred in *Hyde*.<sup>137</sup> See below at section IV.E. Thus, when a deposing party is allowed to mix questions as to which some of the witnesses'

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<sup>130</sup> *Id.*

<sup>131</sup> See discussion *infra* Part IV.E.1.

<sup>132</sup> *King*, 161 F.R.D. at 476.

<sup>133</sup> 7 MOORE ET AL., *supra* note 16 **Error! Bookmark not defined.**, § 30.25[4].

<sup>134</sup> *Overseas Private Inv. Corp. v. Mandelbaum*, 185 F.R.D. 67, 68 (D.D.C. 1999), *summ. j. granted in part and denied in part*, No. 97-01138-CKK, 1999 U.S. Dist. LEXIS 11327 (D.D.C. June 18, 1999).

<sup>135</sup> *Id.* at 69.

<sup>136</sup> *Id.*; see also *Edison Corp. v. Town of Secaucus*, 17 N.J. Tax 178, 183 (N.J. Tax Ct. 1998); *Cabot Corp. v. Yamulla Enters.*, 194 F.R.D. 499, 500 (M.D. Pa. 2000) (choosing to follow *King* rather than *Paparelli*, although the court denied sanctions, finding that plaintiffs had asserted their position in reliance on *Paparelli*).

<sup>137</sup> *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 992-93 (E.D. La. 2000).

answers will bind the corporation with those as to which the answers will not bind the corporation, a very confusing and potentially prejudicial record may be created. This issue is discussed further below at in section IV.G.2.a.

The corporation being deposed created the same ambiguity for itself in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, where the deposing party issued deposition notices under both Federal Rules 30(b)(1) and 30(b)(6) to an individual and the corporation.<sup>138</sup> Capital Cities designated the noticed individual as its Rule 30(b)(6) corporate representative, thereby opening the door to ambiguity as to whether specific testimony was given as a corporate representative or as an individual.<sup>139</sup> While the court held that the witness's testimony was binding on the corporation only as to matters specified in the Rule 30(b)(6) notice, by designating the Rule 30(b)(1) fact witness simultaneously to act as a Rule 30(b)(6) corporate representative, Capital Cities opened itself up to argument that testimony that favored the adverse party was within the Rule 30(b)(6) notice and bound Capital Cities.<sup>140</sup>

### *c. The King Court's Analysis Has Clearly Prevailed*

*Paparelli* has not been overruled or even discussed by any later decisions in the District of Massachusetts. In fact, there has only been one decision in the First Circuit since *Paparelli* that discusses whether inquiry outside the scope of the notice is permissible. In *Philbrick v. eNom, Inc.*, the District of New Hampshire endorsed the King rule in dicta, stating that "most courts have rejected [the *Paparelli*] view, holding instead that a witness produced under the rule can be asked about any subject that is otherwise discoverable."<sup>141</sup> The *Philbrick* court went on, however, to say, "This court need not resolve that disagreement here, because, under either view, [Defendant] was not obligated to ensure that [its representative] could testify on subjects beyond those listed in the notice."<sup>142</sup>

*King* has been discussed more widely, but there are only three relevant decisions since this article was first published in 2003. In an unpublished opinion, the District of New Jersey followed the *King* rule, stating that the

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<sup>138</sup>No. 6:92CV00592, 1996 WL 575946, at \*6 (M.D.N.C. Sept. 6, 1996).

<sup>139</sup>*Id.*

<sup>140</sup>*Id.*

<sup>141</sup>593 F. Supp. 2d 352, 363 n.16 (D.N.H. 2009) (citing WRIGHT ET AL., *supra* note 9, § 2103, at 14 and *Detoy v. City & Cnty. of San Francisco*, 196 F.R.D. 362, 366 (N.D. Cal. 2000)).

<sup>142</sup>*Id.*

proper scope of questioning in a Rule 30(b)(6) deposition is coextensive with the scope of Rule 26.<sup>143</sup>

*d. Motion by Corp's Counsel*

In the District of Massachusetts or in states following *Paparelli*, Corp's counsel should object, terminate the deposition, and move for a protective order. Even in those jurisdictions, counsel may be subject to sanctions for instructing the witness not to answer without terminating the deposition and seeking a protective order. However, *Paparelli* is clearly the minority rule.<sup>144</sup> The case is more often cited for the limitations on instructions by counsel not to answer than it is for its limitation on the scope of examination of a corporate representative.

A more sensible approach even in jurisdictions following *Paparelli* would be for counsel for both sides to agree (unless they can get a judge on the phone immediately, as is possible in some jurisdictions), that they will each preserve their positions on the dispute, finish the deposition on matters not subject to the dispute, and then get a ruling from a court. This approach would be particularly appropriate where either counsel or the witness has invested significant time or expense in traveling to the deposition.

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<sup>143</sup> *Bracco Diagnostics Inc. v. Amersham Health Inc.*, No. 03-6025(SRC), 2005 WL 6714281, at \*2 (D.N.J. Nov. 7, 2005) (stating that “a string of district courts around the country have refused to follow *Paparelli* in favor of a rule that, regardless of the information contemplated in the notice of deposition, the deponent must answer *all* relevant questions” (emphasis in original) (citing *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995)). See also *Equal Emp't Opportunity Comm'n v. Caesars Entertainment, Inc.*, 237 F.R.D. 428, 432 (D. Nev. 2006) (citing *Detoy* and *King* for the proposition that “[m]ost courts have concluded that . . . the scope of the deposition is determined solely by relevance under Rule 26”); *Am. Gen. Life Ins. Co. v. Billard*, No. C10-1012, 2010 WL 4367052, at \*4 (N.D. Iowa Oct. 28, 2010) (“The conclusion reached in *King* [regarding questioning outside the scope of the notice in a 30(b)(6) deposition] has been unanimously accepted by courts addressing the issue since that time.”) (citing *Philbrick*, 593 F. Supp. 2d at 363; *Detoy*, 196 F.R.D. at 366; *Cabot*, 194 F.R.D. at 499; *Overseas Private Inv. Corp.*, 185 F.R.D. at 67; *Edison Corp.*, 17 N.J. Tax at 182).

<sup>144</sup> It is important to note that not all courts addressing these issues see an inherent conflict between the *Paparelli* and *King* rules. One court appears to have been of the opinion that the two rules are, in fact, compatible, and that *Paparelli* stands for the proposition that questioning of the corporate representative as corporate representative is bounded by the topics in the notice, but that questioning beyond the scope of the notice is merely to be treated as the testimony of the representative in an individual capacity, as in *King*. *Falchenberg v. N.Y. State Dept. of Educ.*, 642 F. Supp. 2d 156, 164 (S.D.N.Y. 2008) (citing *Paparelli*, 108 F.R.D. at 730; *Detoy*, 196 F.R.D. at 367; *King*, 161 F.R.D. at 476), *aff'd* by, 338 Fed. Appx. 11 (2d Cir. 2009) (unpublished table decision).

*C. Limitations on the Rights of the Noticing Party*

## 1. Cannot Require Producing Party to Produce a Specific Witness

*a. The Right to Select the Corporate Representative Is Exclusively That of the Corporation*

As is clear from Federal Rule 30(b)(6), the choice of whom to designate as the witness to testify on behalf of a corporation, which is the subject of a corporate representative deposition notice, lies exclusively with the corporation being deposed.<sup>145</sup>

From time to time, a party noticing a corporate representative deposition attempts to designate the person they want to depose on behalf of the corporation, even though that person is not an officer, director or managing agent—a hybrid Rule 30(b)(1) and 30(b)(6) deposition.<sup>146</sup> Such deposition notices might state: “Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, plaintiffs will depose the following individual as defendant’s corporate representative: John Smith Corp’s Highest Level Industrial Hygienist on the following subjects. . . .” or “John Smith is to be deposed as the corporate representative of defendant Corp on the following subjects . . . .”

That is what happened in the situation described at the beginning of this article. Such a notice is improper and should be made the subject of a motion to quash or for protection.<sup>147</sup>

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<sup>145</sup>FED. R. CIV. P. 30(b)(6) (“The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf . . .”). See also, Sinclair & Fendrich, *supra* note 7, at 664 (“The choice of whom to designate rests with the entity. On occasion, a would-be discovering party has sought to require the entity to designate a specific person as the Rule 30(b)(6) witness in a motion to compel. Neither the Rule nor the Advisory Committee commentary suggests that the discovering party has this right. . .”).

<sup>146</sup>See FED. R. CIV. P. 30(b)(1), (b)(6).

<sup>147</sup>See, e.g., Shelton v. Am. Motors Corp., 106 F.R.D. 490, 491 (W.D. Ark. 1985), *rev’d on other grounds*, 805 F.2d 1323 (8th Cir. 1986) (resulting in order that defendant produce six witnesses who had information sought by plaintiffs and then, *if necessary to designate* a deponent in each of the ten categories when corporation moved to quash and for protection in response to 30(b)(6) notice identifying ten subject matters on which twenty-one named deponents were to be examined) (emphasis added); Sinclair & Fendrich, *supra* note 7, at 661 (“In general, a deposition notice that states that the depositions are being taken pursuant to Rule 30(b)(6), but names specific individuals as deponents, is inconsistent with the procedure described in Rule 30(b)(6).”).

In *GTE Products Corp. v. Gee*, defendants issued a deposition notice stating that they would “take the deposition upon oral examination of [the plaintiff] GTE Products Corporation, by [six named individuals],” all of whom were employees of GTE but not all of whom were officers, directors, or managing agents.<sup>148</sup> The court granted GTE’s motion for a protective order as to the two who were clearly not officers, directors, or managing agents, observing that, “[w]hat is not permissible [under Rule 30(b)(6)] is to notice the deposition of a corporation by a particular person who is *not* an officer, director or managing agent.”<sup>149</sup> The court held that defendants could take the deposition under Rule 30(b)(1) by naming a specific officer, director or managing agent of its choosing, or it could take the deposition of the corporation under Rule 30(b)(6), leaving it to GTE to designate an officer, director, managing agent or other person who would testify on its behalf.<sup>150</sup> As to the remaining four witnesses who were neither officers nor directors, GTE agreed to produce them for deposition as individuals, arguing that they also did not qualify as managing agents.<sup>151</sup> The court noted that defendants were free to develop evidence during the depositions that the four were managing agents and, if successful, to use the testimony against the corporation for all purposes under Federal Rule 32(a)(2).<sup>152</sup>

In *Cleveland v. Palmbly*, plaintiff sought to compel defendant to produce Sparks, a resident of Memphis and employee of a defendant corporation, for deposition in Oklahoma City.<sup>153</sup> Among other procedural issues discussed by the court was plaintiff’s contention that the corporation should be compelled to name Sparks as its corporate representative under Rule 30(b)(6).<sup>154</sup> Plaintiff argued that the subject matter to be inquired into in the deposition necessitated that defendant designate Sparks as its corporate representative.<sup>155</sup> The court first rejected plaintiff’s argument that it had the

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<sup>148</sup> 115 F.R.D. 67, 68 (D. Mass. 1987).

<sup>149</sup> *Id.* at 69.

<sup>150</sup> *Id.* at 68.

<sup>151</sup> *Id.* at 69.

<sup>152</sup> *Id.*; see discussion *supra* Part III.A.5; see also *Sanders v. Circle K Corp.*, 137 F.R.D. 292, 293–94 (D. Ariz. 1991); *Operative Plasterers’ & Cement Masons’ Int’l Ass’n v. Benjamin*, 144 F.R.D. 87, 88–90 (N.D. Ind. 1992) (holding a deposition notice citing Rule 30(b)(6) but purporting to designate specific witnesses improper).

<sup>153</sup> 75 F.R.D. 654, 655 (W.D. Okla. 1977).

<sup>154</sup> *Id.* at 656.

<sup>155</sup> Essentially, plaintiff was arguing that Sparks was the most knowledgeable witness and therefore the only logical corporate representative. *Id.* at 656–57.

power to compel Sparks' presence at the deposition without issuance of a subpoena.<sup>156</sup> The court held that since plaintiff had not met his burden of establishing that Sparks was a party or an officer, director, or managing agent of a party, his presence at a deposition could be compelled only by issuance of a subpoena under Federal Rule 45(d).<sup>157</sup> Similarly, the court denied plaintiff's request for imposition of sanctions on the corporation for the corporation's failure to produce Sparks at the scheduled deposition—noting again that only when those who can be deemed to speak on behalf of a party (in this context, an officer, director, or managing agent of a corporation) fail to cooperate in appearing at a deposition may the party be sanctioned.<sup>158</sup> Finally, the court rejected plaintiff's motion to compel the corporate defendant to produce Sparks as its 30(b)(6) representative on the grounds that the subject matters of the inquiry necessitated that Sparks be the witness.<sup>159</sup> The court observed that Rule 30(b)(6) provides that a party who is unable to name the specific employee or agent of an organization that it desires to depose can name the organization as the deponent, describe the subject matter of the inquiry with reasonable particularity and thereby shift to the organization the burden of designating someone to respond to the subject of inquiry.<sup>160</sup> However, the court held that "this Rule does not provide that a party can specifically name an employee of an organization and then require the organization to designate such employee as a witness to testify on behalf of the organization."<sup>161</sup> Obviously, the deposing party needed only to issue its notice under Rule 30(b)(1), stating that Sparks was

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<sup>156</sup> *Id.* at 656.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 656–57.

<sup>159</sup> *Id.* at 657.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 657; *see also* Poseidon Oil Pipeline Co. v. Transocean Sedco Forex, Inc., Nos. Civ.A.00-760, 00-2154, 01-2642, 2002 WL 1919797, at \*3 (E.D. La. Aug. 20, 2002) ("Rule 30(b)(6) imposes on the organization the obligation to select the individual witness, the *party seeking discovery is not permitted to insist that it choose a specific person* to testify unless the person designated is an officer, director, or managing agent whom the corporation may be required to produce under Rule 30(b)(1).") (emphasis in original); *Cleveland*, 75 F.R.D at 657; *Hi-Plains Elevator Mach., Inc. v. Mo. Cereal Processors, Inc.*, 571 S.W.2d 273, 276 (Mo. Ct. App. 1978) (arguing that the privilege and duty to designate the corporate representative is exclusively that of the corporation); *SCM Corp. v. Buehler*, 303 N.Y.S.2d 944, 944 (N.Y. App. Div. 1969) (*per curiam*) (explaining that notice to depose a corporate party may not specify individuals to act as corporate representatives).



to be deposed as an officer, director or managing agent of the corporation—if he qualified as such.<sup>162</sup>

The Federal Rule does not require that the responding corporation, disclose the identity of the corporate representative(s) or the subjects on which they will be designated to testify, in advance of the deposition.<sup>163</sup> Nonetheless, one article has suggested that the responding corporation probably should indicate by letter or another written response the identity of all persons who will be designated as deponents at the Rule 30(b)(6) deposition, their dates of availability for examination, and, for each such person, the areas of inquiry and/or subject area of inquiry as well as the period of time as to which such persons will testify.<sup>164</sup> While not required by the Federal Rule, mutual agreement to make such disclosures voluntarily reasonably in advance of the deposition enhances efficiency for both parties.

For the reasons discussed elsewhere, such disclosures can be particularly helpful to create a record when the witnesses are struggling to retrieve “corporate memory” of ancient events or there are other problems with the scope of the deposition notice.<sup>165</sup> This subject is discussed more fully below.

An interrogating party either seeks a corporate representative deposition under Rule 30(b)(6) or the deposition of a fact witness of his choice under Rule 30(b)(1)—he cannot have it both ways. If he seeks to bind the

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<sup>162</sup> See, e.g., 8A WRIGHT ET AL., *supra* note 9, § 2103, at 32 (stating that “[b]ecause Rule 30(b)(6) imposes on the organization the obligation to select the individual witness, the party seeking discovery is not permitted to insist that it choose a specific person to testify unless the person designated is an officer, director, or managing agent whom the corporation may be required to produce under Rule 30(b)(1).”).

<sup>163</sup> Federal Rule 30(b)(6) does provide that “[t]he named organization must then designate one or more . . . persons who consent to testify on its behalf.” FED. R. CIV. P. 30(b)(6). However, the requirement that it “may set forth, for each person designated, the matters on which the person will testify” is entirely permissive. *Id.* As observed by the court in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, “the court finds that such designation occurred by reason of the simple fact that ABC produced these persons in response to Food Lion’s Rule 30(b)(6) notices.” 1996 WL 575946, at \*No. 6:92CV00592, 1996 WL 575946, at \*6 (M.D.N.C. Sept. 6, 1996).

<sup>164</sup> Sinclair & Fendrich, *supra* note 7, at 667. The authors cite to the order entered by the court in *United States v. Taylor*, as support for this proposition. 166 F.R.D. 356, 360 (M.D.N.C. 1996), *aff’d* by, 166 F.R.D. 367 (M.D.N.C. 1996). The *Taylor* court did not discuss this requirement in its order resolving the complex discovery disputes, but the proposition stated by Prof. Sinclair and Mr. Fendrich that as complexity increases, so does the need for cooperation, can hardly be denied. Sinclair & Fendrich, *supra* note 7, at 667.

<sup>165</sup> See *infra* Part IV.E.1-2.

corporation by the testimony, he must proceed under Federal Rule 30(b)(1) against an officer, director or managing agent of the interrogator's selection or under Rule 30(b)(6), taking the witness designated by the corporation. As to the former, the interrogator gets to select the witness but is at risk that the witness will have no knowledge of the subject, thus putting the deposition back in the pre-Rule 30(b)(6) shot-in-the-dark mode. Under Rule 30(b)(6), the corporation gets to select its representative, but the benefit to the interrogator is that the burden is on the corporation to gather and present testimony on the subjects designated.<sup>166</sup> The extent of that burden is discussed below at section IV.D.2.

*b. The Right to Choose Must be Exercised Carefully*

*State v. Bedell* demonstrates that the corporate party must carefully consider whom it designates as its corporate representative.<sup>167</sup> In that case, plaintiff noticed the deposition of the hospital under West Virginia Rule of Civil Procedure 30(b)(6) and designated several subjects on which she intended to depose the hospital, including the results of an accident investigation.<sup>168</sup> The hospital designated its general counsel to testify as its corporate representative.<sup>169</sup> The only knowledge general counsel possessed of the events at issue was derived from his interviews and conversations with hospital personnel along with a review of a report prepared by his predecessor.<sup>170</sup> When plaintiff attempted to question the witness about the incident and investigation reports, the hospital instructed its representative not to answer based on the attorney-client privilege and work product doctrine.<sup>171</sup> Plaintiff moved to compel, arguing that by designating general counsel as its corporate representative, the hospital waived the privileges—the trial court agreed.<sup>172</sup>

The Supreme Court of Appeals of West Virginia held that the hospital waived both the attorney-client privilege and the work product doctrine with regard to the matters described in the notice of deposition as to which

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<sup>166</sup>FED. R. CIV. P. 30(b)(6).

<sup>167</sup>*See generally* *State ex rel. United Hosp. Ctr., Inc. v. Bedell*, 484 S.E.2d 199 (W. Va. 1997).

<sup>168</sup>*Id.* at 206.

<sup>169</sup>*Id.* at 214.

<sup>170</sup>*Id.* at 216.

<sup>171</sup>*Id.* at 206.

<sup>172</sup>*Id.* at 207.

its general counsel was designated to testify.<sup>173</sup> These matters included the substance of conversations with various hospital employees which helped to form the basis of his knowledge of the facts.<sup>174</sup> The court described this as “fact work product.”<sup>175</sup> As to “opinion work product,” the court held that the hospital had not waived.<sup>176</sup> The court observed that:

[T]he hospital could have designated and properly prepared *someone other than its general counsel* to testify at the Rule 30(b)(6) deposition. Instead, the hospital deliberately designated its general counsel to speak for the corporation and thus, risked the possibility that the plaintiff would delve into privileged matters relevant to the topics about which the general counsel was designated to testify. . . . [T]o allow a corporation or organization that chooses to designate counsel to testify at a Rule 30(b)(6) deposition to refuse to answer certain questions based upon the attorney-client privilege and the work product doctrine would obviously confer unfair advantage on them and would be contrary to the spirit of Rule 30(b)(6) and the discovery process.<sup>177</sup>

Given that a 30(b)(6) deposition “represents the knowledge of the corporation, not of the individual deponents,” how the witness came into possession of the facts should not prevent disclosure of the facts.<sup>178</sup> Designation of any attorney, general counsel or otherwise, should be a last resort for a corporation responding to a corporate representative deposition notice.<sup>179</sup>

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<sup>173</sup> *Id.* at 216.

<sup>174</sup> *Id.* at 217.

<sup>175</sup> *Id.* at 216.

<sup>176</sup> *Id.* at 214.

<sup>177</sup> *Id.* at 216. (Apparently, to the extent the deposing party is allowed by law or by the corporation to go into matters outside the scope of the notice, no waiver will be found to have occurred.)

<sup>178</sup> *Id.* at 215.

<sup>179</sup> Difficulties encountered in responding to a corporate representative deposition notice to disclose a party’s factual contentions without waiving the attorney-client privilege and work-product doctrine are discussed in detail in Elbein, *supra* note 5, at 370–75 (The most reasonable person to conduct the investigation in preparation for the Rule 30(b)(6) deposition is counsel; however, “if counsel chooses to educate the witness, she must by necessity risk revealing knowledge of and strategy about the case.”). For a case in which the shoe ended up on the other

*c. Hybrid Deposition Notices—Unnecessarily Muddy the Waters and Should Not be Used*

As noted above, Texas Rule of Civil Procedure 199.2(b)(1) has a requirement not contained in the Federal Rule—mandating the disclosure of the corporate representative’s identity a “reasonable time before the deposition.”<sup>180</sup> This new requirement adopted presumably to enhance preparation and improve efficiency, has resulted in the adoption of a practice by some Texas practitioners that interjects needless confusion into the process while adding nothing to the questioner’s rights, at least not under the majority rule stated in *King v. Pratt & Whitney*.<sup>181</sup> This same thing could occur under the Federal Rules in response to advance disclosure of the identity of the corporate representative.

Upon the corporation disclosing in advance of the deposition the identity of the deponent and the subject matters on which the designated representative will testify, some practitioners have immediately responded by amending their corporate representative deposition notice to state: “Plaintiff will take the deposition of John Smith, corporate representative of Corp, pursuant to the provisions of Rule 30(b)(6) on the following subject matters . . . .” Now what? A corporate representative deposition notice attempting to designate a specific person as the corporate representative is inconsistent with corporate representative depositions.<sup>182</sup> Has the plaintiff converted the deponent from a corporate representative to a fact witness? Has plaintiff converted the proceeding from a 30(b)(6) deposition to one conducted under 30(b)(1)?<sup>183</sup> If so, then the corporation is no longer

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foot, see *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144–46 (D. Del. 1982) (finding that a binder of documents culled from several thousand documents and organized by plaintiff’s counsel, and used to prepare witnesses, constituted work product revealing important aspects of counsel’s understanding of the case, but the work product protection of those documents, under the circumstances was waived under FED. R. EVID. 612(2) when counsel used them to prepare witnesses to testify, thereby potentially affecting their recollections). As noted by the court, the waiver provisions of Rule 612(2) are not automatic, rather it is subject to a case by case determination by the courts. *James Julian*, 93 F.R.D. at 145; *accord* *FDIC v. Butcher*, 116 F.R.D. 196, 199 n. 1 (E.D. Tenn. 1987) (“The Court retains a great deal of discretion regarding what, if anything, must be disclosed.”), *aff’d* by, 116 F.R.D. 203 (E.D. Tenn. 1987).

<sup>180</sup>TEX. R. CIV. P. 199.2(b)(1).

<sup>181</sup>See generally 161 F.R.D. 475 (S.D. Fla. 1995), *aff’d* by, 213 F.3d 646 (11th Cir. 2000) (unpublished table decision).

<sup>182</sup>*Sinclair & Fendrich*, *supra* note 7, at 661.

<sup>183</sup>*Id.*

required to investigate the matters designated for the deposition. If not, then what was the point in amending the notice to identify the witness by name?

While this practice often adjoins an initial notice for the corporate representative with “the most knowledgeable,” nothing seems to change. A corporation can change its designated representative at any time (even under the Texas Rules so long as it gives notice a reasonable time before the deposition).<sup>184</sup>

Use of such hybrid deposition notices is not only unnecessary, it injects confusion into the process as to the type of deposition to be conducted and the extent of the corporation’s duties. Moreover, hybrid notices seemingly act to eliminate any argument that the witness was being deposed solely as a corporate representative, therefore, the discovering party should be allowed to re-depose the witness as an individual at a later time. Corporate counsel should move to quash, move for protection, or explicitly object to the hybrid notice in writing before the deposition or on the record at the deposition and present its corporate representative subject thereto.

## 2. Cannot Require Producing Party to Present a Witness with Personal Knowledge

### *a. “PMK” Corporate Representative Deposition Notices*

Some practitioners have fallen into the habit of issuing a hybrid notice for corporate representative depositions, which is inconsistent with both the theory and rules governing such depositions.<sup>185</sup> These “persons most knowledgeable” or “PMK” deposition notices often seek to compel the corporation to produce as “corporate representative, the person most

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A notice of deposition which simply indicates that the testimony “is being taken of the organization through the named official or representative” will ordinarily be interpreted as a standard Rule 30(b)(1) notice, and while some courts have suggested that the person designated in the notice will then be expected to testify to matters known or reasonably available to the organization, as under Rule 30(b)(6), no similar duty of preparation is imposed under Rule 30(b)(1).

*Id.*

<sup>184</sup> See, e.g., *Oubre v. Entergy Operations Inc.*, No. CIV.A. 95-3168, 1999 WL 143093, at \*1 (E.D. La. March 12, 1999).

<sup>185</sup> See *In re Senior Living Props., L.L.C.*, 63 S.W.3d 594, 596 (Tex. App.—Tyler 2002, pet. abated), *abrogated in part on other grounds by* *In re Dana Corp.*, 138 S.W.3d 298, 302 (Tex. 2004).

knowledgeable” regarding designated subjects.<sup>186</sup> In the example, the plaintiff issued this type of notice to Corp. Other hybrid notices seek to compel the corporation to produce a representative with “personal knowledge.”<sup>187</sup> In one situation, plaintiff issued a notice requiring a corporate defendant to produce a representative with:

Personal knowledge of conversations between [corporate defendant] and Plaintiff, by telephone or otherwise, regarding payments on the boat at issue in this suit. The time period for conversations referred to is March 1, 1992, through July 15, 1992; and

Personal knowledge of events and conversations surrounding entry of the Consumer Loan Contract–Security Agreement between [corporate defendant] and [Plaintiff] on the premises of the boat dealer . . . .<sup>188</sup>

In opposing the corporation’s motion for protection, plaintiff argued that because she was proceeding under a corporate representative notice issued pursuant to the Texas Rules which require a party, including a corporate representative, to appear in the county in which the suit is pending, the corporation was required to produce eight different witnesses in Houston and at its expense, who were: (1) well below the officer/director/managing agent level, (2) located at corporate headquarters in the upper mid-west, and (3) had personal knowledge of the very specific events about which she sought to question the witnesses.<sup>189</sup> The trial court rejected plaintiff’s argument, and the court of appeals and Texas Supreme Court declined to hear the writ petitions that followed.<sup>190</sup>

These notices miss the point of corporate representative depositions—it is the knowledge of the corporation, not any one witness, that is at issue.<sup>191</sup> The corporation is both entitled and obligated to present one or more witnesses to convey fairly all that is known or reasonably available to it.<sup>192</sup>

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<sup>186</sup> *Id.*

<sup>187</sup> *See* Sanders v. Circle K Corp., 137 F.R.D. 292, 293–94 (D. Ariz. 1991).

<sup>188</sup> *See* Garland v. Hon. Mark Davidson, No. B14-94-01034-CV, 1994 Tex. App. LEXIS 2922 (Tex. App.—Houston [14th Dist.] Dec. 1, 1994, writ denied).

<sup>189</sup> *See id.*

<sup>190</sup> *See id.*

<sup>191</sup> *See, e.g.,* United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C. 1996), *aff’d by*, 166 F.R.D. 367 (M.D.N.C. 1996).

<sup>192</sup> *Id.*

There is no obligation to present the “most knowledgeable” person to address the issues but only a person reasonably prepared to address the subject matters designated in the notice.<sup>193</sup>

*b. Personal Knowledge Under the Federal Rules*

The federal authorities contain a number of decisions discussing attempts by interrogating parties to require a responding corporation to produce a 30(b)(6) witness with personal knowledge. In *Reed v. Bennett*, the Kansas District Court faced a plaintiff who had requested that Nellcor Puritan Bennett, which presumably was an organization although the court does not indicate what type, provide a representative with “personal knowledge.”<sup>194</sup> The court found that Rule 30(b)(6) requires only that designated persons testify as to matters “known or reasonably available to the organization.”<sup>195</sup> Noting that Rule 30(b)(6)’s procedure allows the designation of one company representative whose testimony may bind the corporation on the noticed subjects, the court found that “plaintiff’s [attempted] imposition of a requirement of personal knowledge is at odds with the language and purpose of the rule.”<sup>196</sup>

Other courts have reached similar conclusions. In *United States v. Taylor*, the court held that if the corporate representative does not have “personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees . . . .”<sup>197</sup> Similarly, the Southern District of New York observed in *SEC v. Morelli*, that Rule 30(b)(6) requires only that the representative be adequately prepared, not that the representative have “first-hand knowledge” or personal knowledge.<sup>198</sup> And, as the Eastern District of Pennsylvania observed in

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<sup>193</sup> See, e.g., David Fietze, *The Unreasonable Interpretation of “Reasonable Particularity” in Federal Rule of Civil Procedure 30(b)(6)*, 4 SUFFOLK J. TRIAL & APP. ADVOC. 73, 77 (1999) (“The corporation is not obligated to produce the most knowledgeable person to address each issue outlined in the deposition subpoena and can even prepare one witness to testify on all of the issues.”).

<sup>194</sup> 193 F.R.D. 689, 692 (D. Kan. 2000).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Taylor*, 166 F.R.D. at 361.

<sup>198</sup> 143 F.R.D. 42, 45 (S.D.N.Y. 1992) (“[T]he focus on adequate preparation of the Rule 30(b)(6) deponent . . . undermines [the] plaintiff’s assertion that first-hand knowledge and involvement in the underlying transaction is required for a Rule 30(b)(6) deposition.”); see also *Ierardi v. Lorillard, Inc.*, No. 90-7049, 1991 WL 158911, at \*1 (E.D. Pa. Aug. 13, 1991)

*Ierardi*, the “employee’s lack of personal knowledge is irrelevant.”<sup>199</sup> Rule 30(b)(6) deponents only need to be prepared to provide the “corporation’s knowledge” or information and interpretations reasonably available to the corporation.<sup>200</sup>

In *Bank of New York v. Meridien Biao Bank Tanzania*, Bank of New York (BNY) sought sanctions against Deposit Insurance Board (DIB), arguing that the latter had failed to comply with its Rule 30(b)(6) obligation to produce a witness capable of answering questions regarding the manner in which documents requested by BNY were reviewed, gathered, and produced as required by BNY’s notice.<sup>201</sup> While the witness produced was able to answer questions about DIB’s document retention policy, he was unable to answer questions about how DIB had gone about its document review.<sup>202</sup> In opposition to BNY’s motion for sanctions, DIB offered affidavits of others that described the types of documents searched for and where those searches were conducted.<sup>203</sup> The court reviewed DIB’s obligations under Rule 30(b)(6) to present a witness prepared to answer questions based on information reasonably available to the corporation, whether from documents, past employees, or other sources.<sup>204</sup> The court found that the witness’s inability to answer questions on designated subjects was tantamount to a non-appearance.<sup>205</sup> The court noted that DIB could have designated as witnesses one or more of the four knowledgeable affiants for purposes of satisfying its obligations under Rule 30(b)(6), “*or it could have provided Mr. Mbanga [the witness presented] with their accounts of document production as a means of preparing him for the deposition.*”<sup>206</sup> Thus, even though the court found that there were witnesses available to the producing party who had actual knowledge of the matters into which inquiry was sought, it was only necessary to produce a witness

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(requiring corporation to prepare Rule 30(b)(6) designee for deposition despite the absence of corporate employee with personal knowledge of relevant events).

<sup>199</sup> 1991 WL 158911, at \*1.

<sup>200</sup> *Id.*

<sup>201</sup> 171 F.R.D. 135, 150–51 (S.D.N.Y. 1997).

<sup>202</sup> *Bank of N.Y.*, 171 F.R.D. at 150–51.

<sup>203</sup> *Id.* at 151.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* (emphasis added).



who had been properly prepared to answer questions on behalf of the party.<sup>207</sup>

Again, in *Mitsui & Co. v. Puerto Rico Water Resources Authority*, the court noted that Puerto Rico Water Resources Authority (PRWRA) “must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by Mitsui and to prepare those persons in order that they can answer fully, completely, unequivocally, the questions posed by Mitsui as to the relevant subject matters.”<sup>208</sup>

While it sounds as if the court was requiring PRWRA to present witnesses with personal knowledge, the opposite was the case. PRWRA had responded to a Rule 30(b)(6) notice by refusing to designate a corporate representative and instead presented a series of witnesses, each of whom had personal knowledge about a portion of the subject matters into which Mitsui sought inquiry.<sup>209</sup> PRWRA made no attempt to prepare its witnesses to respond to questions beyond their personal knowledge.<sup>210</sup> When Mitsui sought to press its right for a corporate representative to answer all noticed subjects, PRWRA moved for a protective order, arguing that the deposition would be “‘repetitious, burdensome, harassing, oppressive, [and] cumulative’ of prior discovery.”<sup>211</sup> The court rejected those arguments, noting that PRWRA’s witnesses had left gaps in the subjects designated by Mitsui, which it had a right to have filled by a corporate representative.<sup>212</sup> The court specifically rejected PRWRA’s attempt to respond to a Rule 30(b)(6) notice by presenting only witnesses who had personal knowledge.<sup>213</sup> In that context, the court held that PRWRA had an obligation to designate the persons having knowledge (the court does not say personal knowledge) and to prepare those persons so they could fully, completely and unequivocally answer the questions posed as to the relevant subject matters.<sup>214</sup>

The court’s comments in *Dravo Corp. v. Liberty Mutual Insurance Co.* are also a bit ambiguous, but can be squared with the above holdings.<sup>215</sup>

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<sup>207</sup> *Id.*

<sup>208</sup> 93 F.R.D. 62, 67 (D.P.R. 1981).

<sup>209</sup> *Id.* at 63.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 64.

<sup>212</sup> *Id.* at 65.

<sup>213</sup> *Id.* at 67.

<sup>214</sup> *Id.*

<sup>215</sup> 164 F.R.D. 70 (D. Neb. 1995).

Apparently, Respondent Hastings produced a corporate representative who was unable to answer a number of questions within the scope of the Rule 30(b)(6) notice.<sup>216</sup> Defendants objected to the “failure to produce a ‘knowledgeable and prepared’ designee.”<sup>217</sup> Hastings asserted that no one within the corporation had knowledge of the matters set forth in the 30(b)(6) notices and that those who did possess such knowledge were no longer under defendant’s control.<sup>218</sup> The court observed that the designated witness was clearly deficient with respect to many of the areas for examination covered by the subpoena.<sup>219</sup> The court held that:

If, as Hastings asserts, Hartsock is the most knowledgeable employee within its control, Hastings is obligated to prepare him so that he may give “complete, knowledgeable and binding answers on behalf of the corporation.” If Hastings does not possess such knowledge as to so prepare Hartsock or another designate, then its obligations under Rule 30(b)(6) obviously cease, since the rule requires testimony only as to “matters known or reasonably available to the organization.”<sup>220</sup>

Thus, the dispute before the court was not that the witness lacked personal knowledge, but that he was unable to answer questions within certain noticed areas on any basis. The court stated that to the extent *the corporation* did not possess sufficient knowledge to allow it to prepare its witness, then it had satisfied its obligations under the Rule.<sup>221</sup>

The leading treatises on federal procedure are in accord. Professor Moore notes, “[t]here is no requirement that the deponent have firsthand knowledge and involvement in the underlying transaction.”<sup>222</sup>

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<sup>216</sup> *Id.* at 75–76.

<sup>217</sup> *Id.* at 75.

<sup>218</sup> *Id.* at 75–76.

<sup>219</sup> *Id.* at 76.

<sup>220</sup> *Id.* (citations omitted).

<sup>221</sup> *Id.*

<sup>222</sup> 7 MOORE ET AL., *supra* note 16, § 30.25[3]; *See also* Reed v. Bennett, 193 F.R.D. 689, 692 (D. Kan. 2000); Sanders v. Circle K Corp., 137 F.R.D. 292, 293–94 (D. Ariz. 1991) (holding that plaintiff could not compel corporate defendant to produce a specific corporate representative under Rule 30(b)(6) notice, even though he was the only person in the corporation who had personal knowledge of the facts at issue).

If a party were allowed to notice a corporate representative's deposition by specifying that the deponent must have personal knowledge of the subject matter to be discussed, absurd results might follow. Assume for example that in a slip and fall case, a party designates in a Rule 30(b)(6) notice "the person with the most [personal] knowledge of defendant corporation's practices with regard to maintenance and cleanliness of its public rest rooms." Or, in a toxic tort case, a notice is issued for "the person most knowledgeable about the defendant corporation's practices on its ship dock regarding loading of barges containing benzene during the period 1960-1970." In both cases, the person with the most personal or actual knowledge of the practices, as compared to policies, will probably be a custodian or dock worker. While such employees have very valuable testimony regarding the facts of the case, is it fair to require an organization to present such witnesses as its "representatives" to give testimony that would bind the corporation?<sup>223</sup> Surely, it is no more reasonable to allow an opposing party to force a corporation to accept as its spokesperson an unsophisticated employee to give binding testimony than it would be to allow a corporate party to select unsophisticated family members to give testimony that would bind an individual party.

As noted by one commentator:

At first glance this rule may seem oppressive to an organization that is a party, however, when reviewed it becomes clear that the organization is the one that determines who the witness will be on a particular subject. This can be of great benefit in many cases. Selecting your representatives who will testify is of the utmost importance. Sometimes the person who may know the most about a subject is probably not the best witness available by way of his manner and demeanor.<sup>224</sup>

The author is in fact aware of a situation in which a corporation produced a witness to testify about corporate structure in response to a

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<sup>223</sup>As to the binding effect of testimony by the Rule 30(b)(6) designee, see *infra* at Part IV.E.1.

<sup>224</sup>John E. Clough, *Rx for Defense-Aggressive Use of the Amended Federal Rules of Civil Procedure*, 38 INS. COUNS. J. 354, 360 (1971). The Clough article is also cited with approval in one state's case law. *Hi-Plains Elevator Mach., Inc. v. Mo. Cereal Processors, Inc.*, 571 S.W.2d 273, 276 n.8 (Mo. Ct. App. 1978) ("[A] leading authority has emphasized the importance of the privilege, and duty, of making the designation.").

notice for the witness with “the most personal knowledge” about the designated subjects. Later, in a summary judgment motion, the corporation offered a declaration of a different witness with personal knowledge of the subject. Plaintiff moved to strike the declaration on the ground that the deponent was not the person “most knowledgeable” about the subject of the testimony as admitted by producing a different witness in response to the corporate representative notice. Federal Rule of Evidence 602 does not require the person with “the most knowledge” to be able to testify, only a person with “personal knowledge.”<sup>225</sup> One can easily imagine opposing counsel arguing to a jury that a corporation presented one witness for deposition who was the “most knowledgeable” but presented a different witness to testify at trial and asking the question, “Why is the corporation hiding the most knowledgeable witness from you?” Why put yourself in that position? A corporation should always challenge such a notice and never implicitly acquiesce in the notion that it is producing as its corporate representative the “most knowledgeable” person on the designated subjects.

If the interrogating party wishes to select a witness to testify on behalf of the corporation, the party must comply with Federal Rule 30(b)(1) by designating an officer, director or managing agent of the corporation.<sup>226</sup> Such persons can reasonably be expected to have the necessary judgment and discretion to speak on behalf of and bind a corporate party. The five-factor test for determining who qualifies as a managing agent, as discussed above, focuses on the characteristics of a witness the discovering party can fairly require to give testimony that will bind a corporation.<sup>227</sup>

### *c. Final Thoughts on Attempts to Compel Production of a Corporate Representative with Personal Knowledge*

The price paid for the opportunity to impose on an organization the duty to gather information on designated subjects and provide testimony which will bind the organization is loss of control over who the witness will be and whether the witness selected by the corporation will have personal

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<sup>225</sup> FED. R. EVID. 602.

<sup>226</sup> FED. R. CIV. P. 30(b)(1).

<sup>227</sup> *Supra*, at Part III.A.5. While the Texas Rules contain no express equivalent to Federal Rule 30(b)(1), such authority has been held to be implied in the reservation stated in Texas Rule 199.2(b)(1): “This subdivision does not preclude taking a deposition by any other procedure authorized by these rules.” TEX. R. CIV. P. 199.2(b)(1); *see Hosp. Corp. of Am. v. Farrar*, 733 S.W.2d 393, 395 (Tex. App.—Fort Worth 1987, no writ).

knowledge.<sup>228</sup> In fact, in an article by Jerold Solovy and Robert Byman, the authors argue that not only is a notice “to produce the person most knowledgeable on the following subject areas . . .” improper, but the party seeking such discovery really should not want to depose the person most knowledgeable about the identified subjects.<sup>229</sup> Messrs. Solovy and Byman argue that what the interrogating party really wants is “I don’t know answers” in order to bar any evidence concerning those issues that the corporate party attempts to offer at a later time.<sup>230</sup> Counsel representing corporate parties should be well aware that the opposing party may be trying to use the corporate representative deposition to cut the corporation off from its evidence at trial through “I don’t know” responses and ensure, to the extent possible within the Rules, that their corporate representative is sufficiently prepared on issues that are material to the presentation of the corporation’s position in litigation to prevent that outcome.

*d. Corp Should Have Moved for Protection or to Quash the Deposition Notice Calling for the Witness with the “Most Knowledge”*

It appears clear from the federal authorities and treatises, supported by the decisions from state courts, that the notice to Corp purporting to require the production of a witness with “the most knowledge of” the identified subjects is improper.<sup>231</sup> Corp should have moved to quash the deposition or moved for protection from the requirement that it produce the “person most knowledgeable” as its corporate representative. At the very least, Corp

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<sup>228</sup> See *United States v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996), *aff’d by*, 166 F.R.D. 367 (M.D.N.C. 1996).

<sup>229</sup> Jerold Solovy & Robert Byman, *Invoking Rule 30(b)(6)*, THE NAT’L L. J., OCT. 1998, at B13, states:

Too many litigators do not fully appreciate or fully understand Rule 30(b)(6). Be one of those who do. Your notices will always read: “XYZ Corp. is requested and required, pursuant to [Fed. R. Civ. P.] 30(b)(6), to designate and produce a person or persons to testify on behalf of XYZ on the following matters . . .”

<sup>230</sup> *Id.* (writing from the perspective of counsel opposing a corporation); see *infra*, Parts IV.D.2, IV.E.1; but see generally Ronald B. Cooley, *Defending Corporate Officers in Depositions*, 73 J. PAT. & TRADEMARK OFF. SOC’Y 766 (1991); Elbein, *supra* note 5; P.N. Harkins III, *How to Mount an Effective Defense of Company Employee Depositions*, 58 DEF. COUNS. J. 180 (1991); Sinclair & Fendrich, *supra* note 7.

<sup>231</sup> See, e.g., 7 MOORE ET AL., *supra* note 16, § 30.25[3].

should have objected in writing prior to the deposition or on the record at the deposition and presented its witness subject thereto.

### 3. Not Everything is Discoverable Under Federal Rule 30(b)(6)

#### *a. Alternative Discovery Devices.*

The *Taylor* court noted that some inquiries are better answered through contention interrogatories than Rule 30(b)(6) depositions because the client may then have the assistance of counsel in answering complicated questions involving legal issues.<sup>232</sup> The court did not mean by its ruling to foreclose such a procedure to a corporation simply because it is subject to Rule 30(b)(6).<sup>233</sup> Whether a 30(b)(6) deposition or Rule 33(c) contention interrogatories are more appropriate will depend on a case-by-case determination.<sup>234</sup>

This is especially true when, for example, a party seeks to depose a corporate representative on the meaning of a contract drafted many years earlier. In two cases in which the author has been involved, the contracts at issue had been in use for many years and in one case, there were a series of contracts used over a fifty-year period, the earliest of which was drafted in 1938. There was no one still alive who could assist in preparing the corporate representative to answer questions about why particular language was used and why, over time, the contracts had changed as they did. The only person who could really answer questions about the parties' contentions were in-house counsel, but production of a party's in-house counsel to respond to a corporate representative deposition notice is quite

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<sup>232</sup> *Taylor*, 166 F.R.D. at 362 n.7.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 362. (citing *McCormick-Morgan, Inc. v. Teledyne Indus., Inc.*, 134 F.R.D. 275, 286 (N.D. Cal.), *rev'd on other grounds*, 765 F. Supp. 611 (N.D. Cal. 1991) (contending that a contention interrogatory is more appropriate than a Rule 30(b)(6) deposition in very complex and highly technical lawsuits)); *Protective Nat'l. Ins. v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 282–83 (D. Neb. 1989) (holding that a Rule 30(b)(6) deposition is more appropriate than contention interrogatories where designee has expertise to answer questions); *see also United States v. Mass. Indus. Fin. Agency*, 162 F.R.D. 410, 412 (D. Mass. 1995) (ordering agency to clarify position in interrogatory responses rather than resuming Rule 30(b)(6) deposition); *Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp.*, 125 F.R.D. 578, 594 (N.D.N.Y. 1989) (recognizing viability of interrogatories or Rule 30(b)(6) deposition as alternative to taking deposition of opposing counsel).

dangerous on many levels.<sup>235</sup> Preparing a lay witness to respond to questions about contract contentions is extremely difficult in such circumstances.

The Sinclair & Fendrich article presents a cogent argument that corporate representative depositions were never intended to serve as contention discovery, and that it is unreasonable to expect any human being in the setting of a deposition to synthesize complex factual and legal positions for a party's opponent.<sup>236</sup> That is an exercise best left to contention interrogatories or pre-trial orders.<sup>237</sup>

In *Alexander v. FBI*, the court held that plaintiff was entitled to additional information regarding questions posed at the Rule 30(b)(6) deposition that the witness had improperly failed to answer.<sup>238</sup> Nonetheless, the court held that additional depositions were unwarranted and instead ordered plaintiff to submit its inquiries in the form of interrogatories and requests for production, observing that while 30(b)(6) deponents "must be prepared and knowledgeable . . . they need not be subjected to a 'memory contest.'"<sup>239</sup>

Thus, while there is a broad right to take a corporation's deposition under Rule 30(b)(6), and a deposing party has a right to test a corporation's assertions made through other discovery devices, the courts will, in appropriate circumstances, require a discovering party to utilize contention interrogatories in lieu of a corporate representative deposition.<sup>240</sup>

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<sup>235</sup> See e.g., *infra* IV.C.3.b.

<sup>236</sup> Sinclair & Fendrich, *supra* note 7, at 702 & n.271.

<sup>237</sup> *Id.* at 735–36.

<sup>238</sup> 186 F.R.D. 137, 142 (D.D.C. 1998).

<sup>239</sup> *Id.* at 142–43. *But see* *Ierardi v. Lorillard, Inc.*, No. CIV.A.90-7049, 1991 WL 158911, at \*1 (E.D. Pa. Aug. 13, 1991) (rejecting defendant's motion for protective order barring plaintiff from conducting Rule 30(b)(6) depositions when it had stated in sworn answers to interrogatories that no current employee had personal knowledge of any of the information plaintiffs sought. Additionally, the court notes that answers to interrogatories are an inadequate substitute for Rule 30(b)(6) testimony and the right of opposing party to test claimed lack of knowledge, and that individual employee's lack of personal knowledge is irrelevant under Rule 30(b)(6), which looks to information available to corporation); *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989) (rejecting defendant's attempt to limit Rule 30(b)(6) deposition by providing information in interrogatories because deposition process provides means to obtain more complete information and is therefore favored; however, the court recognized that, *supported by a prior motion for a protective order*, such may be an appropriate procedure).

<sup>240</sup> See *Ierardi*, 1991 WL 158911, at \*1; *Marker*, 125 F.R.D. at 126.

*b. Rule 30(b)(6) Depositions Are Subject to the Rules of Privilege*

Rule 30(b)(6) is also subject to the rules of privilege. *SEC v. Morelli* is an insider trading case in which defendants served interrogatories and a request for production inquiring into the factual bases and documents supporting the SEC's allegations against them.<sup>241</sup> Defendants then issued a Rule 30(b)(6) deposition notice, identifying as the subjects of inquiry: the time and place of defendant's alleged receipt of insider information; the source and substance of the information allegedly received by defendant; the substance of the information communicated to the other defendants; and the identity of any other individuals to whom information was passed.<sup>242</sup> The SEC moved for a protective order under Rule 26(c), asserting the impropriety of the Rule 30(b)(6) deposition because the SEC did not participate in or have personal knowledge of the events at issue, the proposed deposition would violate the attorney-client privilege and it would violate the attorney work-product privilege.<sup>243</sup> The court reviewed authorities rejecting the proposition that Rule 30(b)(6) was limited to transactions in which the organization participated or of which it had personal knowledge.<sup>244</sup>

As to the attorney-client privilege, the court in a footnote acknowledged the risk a party takes in designating someone involved in the attorneys' investigative efforts as its Rule 30(b)(6) representative.<sup>245</sup> The court noted that "since the [attorney-client] privilege extends to parties who act as agents of the attorney . . . the Court rejects [defendant] Morelli's argument that the SEC can designate its investigator . . . as the Rule 30(b)(6) deponent, without risking a breach of the attorney-client privilege."<sup>246</sup>

While the court held that information regarding the factual bases for plaintiff's complaint is not privileged, the communication of that information is privileged.<sup>247</sup> The court rejected the SEC's assertion of attorney-client privilege in the absence of specific citation by the SEC to

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<sup>241</sup> 143 F.R.D. 42, 43 (S.D.N.Y. 1992).

<sup>242</sup> *Id.* at 44.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 45.

<sup>245</sup> *Id.* at 46 n.1; *see also* State *ex rel.* United Hosp. Ctr., Inc. v. Bedell, 484 S.E.2d 199, 216 (W. Va. 1997); Elbein, *supra* note 5, at 370–75.

<sup>246</sup> *Morelli*, 143 F.R.D. at 46 n.1. (citations omitted).

<sup>247</sup> *Id.* at 46.



privileged communications that would be revealed by allowing the deposition to go forward.<sup>248</sup>

As to the work-product privilege, however, the court held that the specified areas of inquiry constituted an impermissible inquiry into the mental processes and strategies of the SEC, particularly in light of the government's assertion that all relevant, non-privileged evidence had already been disclosed to defendants.<sup>249</sup> Therefore, the court found that the only purpose for the deposition was to inquire into how the SEC intended to marshal the facts, document testimony in its possession and discover the inferences sought to be drawn, which is an improper invasion of the attorney's strategy and thinking.<sup>250</sup> The Rule 30(b)(6) deposition notice was quashed, but the court allowed defendants to inquire into the SEC's contentions by way of interrogatories.<sup>251</sup>

A Texas appellate court faced a claim of privilege as a bar to a corporate representative deposition in deciding *In re Senior Living Properties, L.L.C.*<sup>252</sup> Counsel for the corporation was concerned that the deposition that related to positions taken by the corporation in other litigation would violate the attorney-client privilege.<sup>253</sup> The court held that the record did not establish that a violation of the attorney-client privilege would occur.<sup>254</sup> It did, however, recognize that if questions posed would violate the privilege, counsel for the corporation could instruct the witness not to answer and request a hearing, at which evidence must be presented to support the objection and instruction.<sup>255</sup> Texas Rule of Evidence 503(c) specifically provides that the attorney-client privilege may be asserted by the representative of a corporation.<sup>256</sup>

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<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 44 and 47 (The Rule 30(b)(6) notice specified six areas of inquiry, including: the time and place of Morelli's alleged receipt of insider information; the source and substance of the information allegedly received by Morelli; the substance of the information communicated to Petrone and Zanengo; and the identity of any other individuals to whom information was passed).

<sup>250</sup> *Id.* at 46–47.

<sup>251</sup> *Id.* at 48.

<sup>252</sup> 63 S.W.3d 594, 598 (Tex. App.—Tyler 2002, pet. abated), *abrogated in part on other grounds by* *In re Dana Corp.*, 138 S.W.3d 298, 302 (Tex. 2004).

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> TEX. R. EVID. 503(c) (“The [attorney-client] privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor,

Designating a witness to act as a corporate representative, knowing that the sources of the witness's testimony will raise privilege issues, places the corporation at its peril. In *Allstate Texas Lloyds v. Johnson*, the corporation designated as its corporate representative the adjuster who investigated the fire which destroyed plaintiff/insured's home.<sup>257</sup> When questioned about Allstate's knowledge of facts and identity of witnesses with personal knowledge, both matters within the scope of its notice, counsel instructed the witness not to answer based on attorney-client and investigative privileges.<sup>258</sup> In addition, Allstate failed to designate an alternative witness who could testify without allegedly intruding on those protected areas.<sup>259</sup> The court held that Allstate had in effect failed to produce a witness able to testify on matters described with reasonable particularity in the notice.<sup>260</sup> On plaintiff's motion for sanctions, the trial court struck all of Allstate's pleadings, prohibited Allstate from engaging in any further discovery, and ordered Allstate to pay plaintiff's costs of the deposition.<sup>261</sup> The Court of Appeals upheld the sanctions, noting that the severity of the sanction striking pleadings could be taken up on appeal.<sup>262</sup>

*c. Duplicative Depositions May be Avoided*

While the fact that a principal of a corporation has already been deposed as a fact witness does not automatically prevent the re-taking of his deposition as a corporate representative, it may do so where the re-taking would be duplicative.<sup>263</sup> In *A.I.A. Holdings*, plaintiffs sought a protective order to require defendants to proceed by way of interrogatories rather than corporate representative deposition because three of its principals had already been deposed in their individual capacities on the vast majority of subjects set forth in the notice.<sup>264</sup> While the court noted that depositions of an entity are significantly different from individual depositions by virtue of

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trustee, or similar representative of a corporation, association, or other organization, whether or not in existence.”).

<sup>257</sup> 784 S.W.2d 100, 101 (Tex. App.—Waco 1989, no writ).

<sup>258</sup> *Id.* at 103.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 104.

<sup>261</sup> *Id.* at 102.

<sup>262</sup> *Id.* at 105.

<sup>263</sup> *A.I.A. Holdings, S.A. v. Lehman Bros., Inc.*, No. 97CIV4978LMMHBP, 2002 WL 1041356, at \*3 (S.D.N.Y. May 23, 2002).

<sup>264</sup> *Id.* at \*2.

the entity's duty to provide all relevant information known or reasonably available to the entity,<sup>265</sup> it held that in the case of a small, closely-held corporation, there may be no difference between the knowledge of the entity and the knowledge of its principals.<sup>266</sup> The court concluded that if the plaintiff/entity adopted the testimony of its principals in their individual capacities as the testimony of the entity, rendering further deposition entirely or substantially redundant, then a 30(b)(6) deposition would not be justified.<sup>267</sup>

*d. Does Taking a Given Witness's Deposition as a Corporate Representative and Then Noticing the Witness as an Individual Constitute an Attempt to Take the Deposition of the Same Witness Twice?*

As we can see from the decision in *A.I.A. Holdings*, if a witness has already been deposed as an individual, there may be an argument that further depositions as a corporate representative, at least as to a small, closely-held company, would be redundant and should be prevented.<sup>268</sup> Federal Rule 26(b)(2)(C)(i)<sup>269</sup> provides a basis for seeking a protective order to prevent duplicative and wasteful discovery.

However, what if the discovering party decides that it wants to retake the deposition of a witness who was presented as a corporate representative? Does that constitute a duplicate deposition? What if the discovering party intended to take the deposition of a particular corporate officer or employee later in discovery and suddenly finds itself confronted

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<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at \*3.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* Of course, avoiding this result may be simply a matter of drafting the noticed subject matters so as not to overlap with the deposition(s) already taken, assuming that such can be done in good faith. *But see* Ierardi v. Lorillard, Inc., No. 90-7049, 1991 WL 158911, at \*2 (E.D. Pa. Aug. 13, 1991) (rejecting without comment defendant's assertion that plaintiff's prior deposition of a fact witness made it unnecessary to depose that witness as a 30(b)(6) representative as being "without merit").

<sup>269</sup> FED. R. CIV. P. 26(b)(2)(C)(i) provides:

On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive . . . .

by that very witness presented as a corporate representative? The latter risk is reduced if the producing party has disclosed the identity of the corporate representative in advance of the deposition. Prior disclosure would also seem to support an argument by the corporation against an attempt to redepose the corporate representative as a fact witness as a “second bite at that particular apple.” In that regard, prior disclosure benefits both parties.

Professor Moore states unequivocally that “[a] party must obtain leave of court to take the deposition of a person who has already been deposed in the case . . . . The rule requiring leave of court to take a second deposition applies to an entity that is deposed pursuant to Rule 30(b)(6).”<sup>270</sup> This rule applies even though a party may be deposing a different corporate representative while still seeking a second deposition of the entity.<sup>271</sup> However, the slightly different question posed here is whether the person presented as a corporate representative may later be deposed as an individual without first seeking leave of court.

One author believes that the Federal Rules provide a clear answer.<sup>272</sup> He states that “some rules of civil procedure provide that an inquiring party must obtain leave of court before re-deposing any witness who has previously been deposed *in a 30(b)(6) deposition*. This is not the case under the federal rule, *which specifically permits the re-deposition of designated representatives in ‘regular’ depositions*.”<sup>273</sup> The author cites no authority in support of this statement, and this writer can find none. In fact, to the extent the Federal Rules address the issue at all, they would seem to go in the opposite direction. Federal Rule 30(a)(2)(A)(ii) specifically requires leave of court if “the deponent has already been deposed in the case . . . ,”<sup>274</sup> and the Comments to the 1993 Amendments state that “[p]aragraph (2)(B) is new. It requires leave of court if any witness is to be deposed in the action more than once.”<sup>275</sup> Unless the author is relying on the last sentence of Rule

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<sup>270</sup>7 MOORE ET AL., *supra* note 16, § 30.05[1][c]; *see also* Ameristar Jet Charter, Inc. v. Signal Composites, Inc., 244 F.3d 189, 192 (1st Cir. 2001) (holding that Signal was not allowed to later take a second 30(b)(6) deposition of same corporation without leave of court when Ameristar took 30(b)(6) deposition of non-party corporation at which Signal participated).

<sup>271</sup>*Ameristar*, 244 F.3d at 192. This result would not seem to follow, however, when it is the corporation that produces multiple representatives to respond to a single 30(b)(6) notice.

<sup>272</sup>Walt Auvil, *Affirmative Uses for the Corporate Designee Deposition*, THE BRIEF, Fall 1998, at 64.

<sup>273</sup>*Id.* (emphasis added).

<sup>274</sup>FED. R. CIV. P. 30(a)(2)(A)(ii).

<sup>275</sup>FED. R. CIV. P. 30 cmt. on 1993 Amendments (West Supp. 2002).

30(b)(6), the basis for his statement is not clear.<sup>276</sup> It is respectfully submitted that such would not be a fair reading of that sentence, particularly in light of the specific wording of Federal Rule 30(a)(2)(A)(ii). Instead, we must look elsewhere for the answer.

As observed by the *Taylor* court, depositions of corporate representatives and individuals are very different.<sup>277</sup> “The designated [corporate representative] is ‘speaking for the corporation’ and this testimony must be distinguished from that of a ‘mere corporate employee’ whose deposition is not considered that of the corporation and whose presence must be obtained by subpoena.”<sup>278</sup> A Rule 30(b)(6) witness does not give his personal opinions.<sup>279</sup> Rather, he presents the information known or reasonably available to the corporation on the designated topics.<sup>280</sup> “The designee, in essence, represents the corporation just as an individual represents him or herself at a deposition.”<sup>281</sup> Thus, an argument could be made for the proposition that John Smith, as corporate representative is a different witness than John Smith as himself. Such an argument would be particularly appropriate in a jurisdiction following *Paparelli*, because questioning would be limited to the scope of the subjects designated in the 30(b)(6) notice.<sup>282</sup>

On the other hand, the majority of jurisdictions follow *King*, which imposes no such limitation;<sup>283</sup> the interrogating party may ask any question within the broad confines of Federal Rule 26(b)(1).<sup>284</sup> In those jurisdictions, unless the interrogator is able to use up his full seven hours questioning only on the subject matters designated in the 30(b)(6) notice, an argument could be made that the interrogator already questioned the witness, without limitation on scope, and should not be able to re-depose the witness.<sup>285</sup>

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<sup>276</sup>FED. R. CIV. P. 30(b)(6) (“This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.”).

<sup>277</sup>See 166 F.R.D. 356, 361 (M.D.N.C. 1996), *aff’d by*, 166 F.R.D. 367 (M.D.N.C. 1996).

<sup>278</sup>*Id.* (quoted with approval in *A.I.A. Holdings, S.A. v. Lehman Bros., Inc.*, No. 97CIV4978LMMHBP, 2002 WL 1041356, at \*3 (S.D.N.Y. May 23, 2002)).

<sup>279</sup>*Id.*

<sup>280</sup>*Id.*

<sup>281</sup>*Id.*

<sup>282</sup>108 F.R.D. 727, 729 (D. Mass. 1985).

<sup>283</sup>161 F.R.D. 475, 476 (S.D. Fla. 1995), *aff’d by*, 213 F.3d 646 (11th Cir. 2000).

<sup>284</sup>FED. R. CIV. P. 26(b)(1) (“any nonprivileged matter that is relevant to any party’s claim or defense . . .”).

<sup>285</sup>FED. R. CIV. P. 30(d)(1)–(2).

Professor Albright states that a party may depose an organization through its representatives and “also may depose any of the entity’s representatives or employees individually.”<sup>286</sup> In jurisdictions that have not yet ruled on whether they will follow *Paparelli* or *King*, one must be careful before assuming that there will be another shot at the witness, particularly if the identity of the witness was disclosed in advance of the deposition. While counsel may think that there is an advantage in surprise, prior disclosure of the identity of the witness may very well eliminate or at least reduce the risk of a follow-on fact witness deposition of the same corporate representative.

It may very well be that counsel can work out an agreement in advance. Counsel for the corporation has an incentive to agree that two different depositions be taken to avoid confusion as to when the witness is speaking as a corporate representative who will give testimony that binds the corporation, and when he is speaking in his individual capacity. A compromise by agreement between counsel on the total time for the two depositions would probably be beneficial to both sides.

Short of an agreement between counsel, the discovering party must be careful to make it clear that he is deposing the witness only as a corporate representative and hope for a lenient court. If counsel tries to cover both aspects of the witness’s testimony as best he can, the court will probably hold that he has already deposed the witness and will not get another chance.

#### *D. The Duties of the Producing Corporation*

##### 1. The Corporation is Required to Provide Information Known or Reasonably Available to It

As is apparent from the discussions above, under Federal Rule 30(b)(6), the designated representative is to provide answers based not only on matters “known” to the organization but also those “reasonably available” to it.<sup>287</sup> While the former is not particularly controversial, the latter has inspired much debate. The courts’ interpretation of that duty has created a very lopsided burden on corporations.

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<sup>286</sup> ALBRIGHT ET AL., *supra* note 33, § 13.5(b) (noting, however, that such a right is still subject to other limitations in the Rules, such as Rule 191.3’s prohibition on unduly burdensome or duplicative discovery and Rule 190.2(c)(2)’s time limits).

<sup>287</sup> FED. R. CIV. P. 30(b)(6).

Once the deposition has been noticed and the subject matter to be inquired into described with reasonable particularity, certain duties arise for the producing party: (1) designate a witness capable of answering questions on the designated subject(s); (2) designate more than one witness, if necessary, in order to provide meaningful responses to the areas of inquiry that are specified with reasonable particularity; (3) prepare the witness(es) to testify not only on matters known to the corporation but also matters reasonably available to it; and (4) designate additional witness(es) when it becomes apparent that the designated witness is unable to respond to certain relevant areas of inquiry known to or reasonably available to the corporation.<sup>288</sup> The producing party may not avoid these duties merely because it has already produced documents or discovery answers on a topic in the 30(b)(6) deposition notice, or even where witnesses with personal knowledge on a topic have already been deposed in their individual capacities.<sup>289</sup>

## 2. The Duty to Investigate

### *a. Known or Reasonably Available Information*

As discussed above, the organization has a duty to present a witness or witnesses prepared to answer questions on behalf of the organization regarding the subject matters designated in the notice. However, producing a witness who is not capable of disclosing the information without violating privileges is the equivalent of not presenting a witness at all.<sup>290</sup> The witness must not only have the information, he or she must be able and willing to share it.

The key to the 30(b)(6) deposition is the information known or reasonably available to the organization.<sup>291</sup> Neither the witness nor the

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<sup>288</sup>Alexander v. FBI, 186 F.R.D. 137, 141 (D.D.C. 1998).

<sup>289</sup>La. Pac. Corp. v. Money Mkt. 1 Inst. Inv. Dealer, 285 F.R.D 481, 487 (N.D. Cal. 2012) (rejecting “the argument that a Rule 30(b)(6) deposition is unnecessary or cumulative simply because individual deponents—usually former or current employees of the entity whose Rule 30(b)(6) deposition is sought—have already testified about the topics noticed in the Rule 30(b)(6) deposition notice” or because the noticed topics are addressed in the entity’s written responses to interrogatories).

<sup>290</sup>Allstate Tex. Lloyds v. Johnson, 784 S.W.2d 100, 103–04 (Tex. App.—Waco 1989, no writ).

<sup>291</sup>United States v. Taylor, 166 F.R.D. 356, 360 (M.D.N.C. 1996), *aff’d by*, 166 F.R.D. 367 (M.D.N.C. 1996).

corporation is required to have participated in the transactions or events in controversy or have actual knowledge of facts or information relevant to the action.<sup>292</sup>

If the interrogating party issues a Rule 30(b)(6) notice specifying matters as to which the organization does not have knowledge or a reasonable way of obtaining such knowledge, the organization should advise the interrogating party that it has investigated, that it has no knowledge of the subject matters designated, and such is not reasonably available to it.<sup>293</sup> If the entity has no knowledge of the matters designated in the notice and no reasonable ability to discover such, then it has no obligation to produce a witness; the Rule only requires the organization to produce a witness to testify regarding “matters known or reasonably available to the organization.”<sup>294</sup> If the inquiring party is not sufficiently satisfied to withdraw the notice, which it is unlikely to be, the organization would seem to have only two choices: (1) it can produce a witness to testify that the organization does not have the information sought and such information is not reasonably available to it (and to the efforts made to locate such information) or (2) move for a protective order and put the same information before the court by way of affidavit or declaration.<sup>295</sup> Ignoring the notice is an obvious invitation to sanctions.<sup>296</sup>

Clearly, information that is “reasonably available” extends even to information lost from the personal knowledge of the corporation’s current employees due to the passage of time.<sup>297</sup> *United States v. Taylor*

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<sup>292</sup>SEC v. Morelli, 143 F.R.D. 42, 45 (S.D.N.Y. 1992); *see also* Ierardi v. Lorillard, Inc., No. 90-7049, 1991 WL 158911, at \*1 (E.D. Pa. Aug. 13, 1991) (requiring corporation to prepare Rule 30(b)(6) designee for deposition despite absence of corporate employee with personal knowledge of relevant events); *Martin v. Valley Nat’l Bank*, 140 F.R.D. 291, 315 (S.D.N.Y. 1991) (allowing Rule 30(b)(6) deposition of the Director of Enforcement of the Department of Labor); *see also* Marker v. Union Fid. Life Ins. Co., 125 F.R.D. 121, 126 (M.D.N.C. 1989); *Fed. Deposit Ins. Corp. v. Butcher*, 116 F.R.D. 196, 202 (E.D. Tenn. 1986) (requiring FDIC to produce deponent who was adequately prepared for deposition even though FDIC had not participated in the underlying loan transactions on which the litigation focused), *aff’d by*, 116 F.R.D. 203 (E.D. Tenn. 1987); *Mitsui & Co. (U.S.A.) v. P.R. Water Res. Auth.*, 93 F.R.D. 62, 67 (D.P.R. 1981).

<sup>293</sup>*See* Sinclair & Fendrich, *supra* note 7, at 747–49 & n.506.

<sup>294</sup>*Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 76 (D. Neb. 1995) (quoting FED. R. CIV. P. 30(b)(6)); 7 MOORE ET AL., *supra* note 16, § 30.25[3].

<sup>295</sup>*See* *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 76 (D. Neb. 1995) (quoting FED. R. CIV. P. 30(b)(6)); 7 MOORE ET AL., *supra* note 16, § 30.25[3].

<sup>296</sup>7 MOORE ET AL., *supra* note 16, § 30.25[3].

<sup>297</sup>*Taylor*, 166 F.R.D. at 360–61.



demonstrates how far the courts have extended the duty of a corporation to investigate and disclose its case to the opposing party.<sup>298</sup> In *Taylor*, the United States served a Rule 30(b)(6) notice on defendant Union Carbide Corporation (UCC) in a CERCLA action in which the government sought to recover cleanup costs of a Superfund site involving numerous defendants and activities going back several decades.<sup>299</sup> The court noted that “[k]nowledgeable people [had] died, memories . . . faded, and the corporate division of UCC [involved had been] sold [several] years prior to the . . . litigation.”<sup>300</sup> The court acknowledged that because of that sale and the passage of time, many of the individuals with personal knowledge of the relationship between UCC and the division which operated the site might no longer be employed by UCC or might even be dead.<sup>301</sup> UCC moved to quash the Rule 30(b)(6) notice, which was in part granted and in part denied by the court.<sup>302</sup> The deposition proceeded, but disputes arose among the various parties as to whether UCC had properly prepared its witnesses as required by the court’s prior order in *Marker v. Union Fidelity Life Insurance Co.*<sup>303</sup> UCC asserted that its duty under both Rule 30(b)(6) and the court’s prior order was to provide information through its witnesses where it possessed documents or current employees upon which information could be based and otherwise to identify the retired employees that would be in a position to speak on the topics where there was no current corporate knowledge.<sup>304</sup> The *Taylor* opinion provides an excellent discussion of a corporation’s duties with regard to information held by former employees and other issues arising under Rule 30(b)(6).

First, UCC proposed a seemingly *quid pro quo* rule, that any designee testifying in a particular area would be deemed competent to testify in that area at trial and that the Rule 30(b)(6) testimony would be admissible for any party at trial.<sup>305</sup> In other words, UCC sought to have the court declare that whatever testimony UCC’s Rule 30(b)(6) witness gave would be admissible for UCC as well as against UCC.<sup>306</sup> The court correctly rejected

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<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 358.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 358–59; 125 F.R.D. 121, 126 (M.D.N.C. 1989).

<sup>304</sup> *Taylor*, 166 F.R.D. at 359 n.4.

<sup>305</sup> *Id.* at 359.

<sup>306</sup> *Id.*

that suggestion as contrary to both the Rules of Civil Procedure and the Rules of Evidence.<sup>307</sup> The court held that testimony by a Rule 30(b)(6) witness was still subject to the Federal Rules of Evidence, that is, the testimony still had to comply with the requirements of personal knowledge, opinion, hearsay, and other relevant requirements.<sup>308</sup> Thus, the Government could use whatever the witnesses said against UCC under the provisions of Federal Rule of Civil Procedure 32(a)(2)<sup>309</sup> and Federal Rule of Evidence 801(d)(2),<sup>310</sup> but UCC could use the statements only if the witness at the deposition could satisfy the requirements of Federal Rule of Evidence 602, requiring personal knowledge.<sup>311</sup> The significance of this ruling becomes apparent when viewed in the context of the court's other rulings.

As to areas of inquiry in which no current UCC employee had knowledge, UCC proposed that:

If despite good faith efforts by Union Carbide to prepare its designees, a designee is unable to respond to a specific area of inquiry, Union Carbide may call other witnesses to testify on that subject at the trial of this matter provided that Union Carbide identifies such witnesses prior to the close of the 30(b)(6) Deposition transcript. Union Carbide's failure to designate a witness on a particular topic or sub-topic shall not preclude Union Carbide's ability to make arguments at trial with respect to such topic or sub-topic based upon testimony or documents admitted by otherwise

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<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> FED. R. CIV. P. 32(a)(2).

<sup>310</sup> FED R. EVID. 801(d)(2). A statement is not hearsay if it is:

(2) An Opposing Party's Statement. The statement is offered against an opposing party and (A) was made by the party, in an individual or representative capacity; [or] . . . (C) was made by a person whom the party authorized to make a statement on the subject; [or] (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed . . . *Id.*

<sup>311</sup> FED. R. EVID. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *see also* W.R. Grace & Co. v. Viskase Corp., No. 90 C 5383, 1991 WL 211647, at \*2 (N.D. Ill. Oct. 15, 1991) (stating that Rule 30(b)(6) deposition testimony may be used by the *adverse* party for any purpose).

competent means (e.g., previous deposition testimony and documents previously produced in discovery).<sup>312</sup>

The court noted that UCC's proposed order directly implicated the provisions of Rule 30(b)(6) with regard to a corporation's duty to prepare its representative for deposition.<sup>313</sup> The court stated that Rule 30(b)(6) requires a corporation not only to produce such number of persons as will satisfy the notice, but also requires the corporation to prepare its designated representatives "so that they may give complete, knowledgeable and binding answers on behalf of the corporation."<sup>314</sup> Noting that the testimony elicited at a Rule 30(b)(6) deposition represents the knowledge of the corporation, not of the individual deponents, the court held that "[if] the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation."<sup>315</sup> The court went on to note that the designee must not only testify about facts within the corporation's knowledge, "but also its subjective beliefs and opinions . . . [and] its interpretation of documents and events."<sup>316</sup>

On the subject of facts, beliefs, interpretations and opinions held by former employees, the court noted that a corporation no longer employing individuals who have memory of a distant event or that such individuals are deceased does not relieve a corporation of its duties under Rule 30(b)(6) to the extent the matters are reasonably available from documents, past employees, or other sources.<sup>317</sup> The court held that in order to properly prepare its Rule 30(b)(6) designees, UCC was required to have deponents review prior fact witness deposition testimony as well as documents and deposition exhibits in order to state its corporate position with regard to the

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<sup>312</sup>*Taylor*, 166 F.R.D. at 359–60.

<sup>313</sup>*Id.* at 360.

<sup>314</sup>*Id.* at 360–61 (quoting *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989)).

<sup>315</sup>*Id.* at 361; *see also* *Resolution Trust Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993); *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D. Neb. 1995); *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 338, 342–43 (N.D. Ill. 1995); *SEC v. Morelli*, 143 F.R.D. 42, 45 (S.D.N.Y. 1992).

<sup>316</sup>*Taylor*, 166 F.R.D. at 361 (citing *Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 20 (E.D. Pa. 1986); *Ierardi v. Lorillard, Inc.*, No. 90-7049, 1991 WL 158911 at \*2 (E.D. Pa. Aug. 13, 1991)).

<sup>317</sup>*Taylor*, 166 F.R.D. at 361.

prior deposition testimony.<sup>318</sup> The court required UCC to have its representatives review testimony and documents even in the hands of third persons if it intended to offer such at trial.<sup>319</sup> Other courts have also held that it may be necessary for the corporate representative to even engage in a burdensome review of voluminous documents in order to prepare himself to be deposed.<sup>320</sup> It is critical that counsel understands, however, that at least some courts will require production or disclosure of the particular documents reviewed by the corporate representative, even when the producing party objects that counsel's selection of such documents constitutes attorney work product.<sup>321</sup>

*b. Reasonably Available Information Includes that Information Available to Subsidiaries and Affiliates within the Control of the Deponent*

The question of whether information is considered “reasonably available” to a corporation if it is in the hands of separate corporations which are subsidiaries or affiliates of the corporate deponent arose in

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<sup>318</sup> *Id.* at 362.

<sup>319</sup> *See id.*

<sup>320</sup> *Calzaturificio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 37 (D. Mass. 2001); *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 639 (D. Minn. 2000).

We understand that the burden upon the responding party, to prepare a knowledgeable Rule 30(b)(6) witness, may be an onerous one, but we are not aware of any less onerous means of assuring that the position of a corporation, that is involved in litigation, can be fully and fairly explored.

*Prokosch*, 193 F.R.D. at 639. *But see* Wollin & Millsom, *supra* note 22, at 34 n.93 (stating that in order to properly prepare its Rule 30(b)(6) designees, [the rule] precludes “proponents of discovery from wielding the discovery process as a club by propounding requests compelling the recipient to assume an excessive burden,” and thus “the recipient of a Rule 30(b)(6) request is not required to have its counsel muster all of its factual evidence to prepare a witness to be able to testify regarding a defense or claim” (quoting *Smithkline Beecham Corp. v. Apotex Corp.*, No. 98 C 3952, 2000 WL 116082, at \*9 (N.D. Ill. Jan. 24, 2000))).

<sup>321</sup> *See, e.g.*, *Seven Seas Cruises S. DE R.L. v. V. Ships Leisure SAM*, No. 09-23411-CIV, 2010 WL 5187680, at \*3 (S.D. Fla. Dec. 10, 2010) (holding that it is the corporation’s responsibility to select the documents for review, so “without a greater showing that the documents reviewed by the 30(b)(6) deponent in preparation for his/her deposition are actually work product, the documents are not shielded them [sic] from disclosure”); *but see* *Sporck v. Peil*, 759 F.2d 312, 319 (3d Cir. 1985) (holding “that the trial court committed clear error of law in ordering the identification of the documents selected by counsel” in preparation for a fact witness’s deposition).

*Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc.*<sup>322</sup> In that case, a dispute arose over the obligation of a parent corporation to answer questions regarding information in the hands of its wholly owned subsidiary and affiliated businesses.<sup>323</sup> The court looked by analogy to the duty of a corporate party to answer interrogatories based not only on the information contained in its own files but also that possessed by its own employees and wholly owned subsidiaries.<sup>324</sup> The court concluded that the scope of response to a Rule 30(b)(6) notice of deposition is the same as the principle applied to requests for production of documents.<sup>325</sup>

[T]he scope of the entity's obligation in responding to a 30(b)(6) notice is identical to its scope in responding to interrogatories . . . or a document request . . . namely, it must produce a witness prepared to testify with the knowledge of the subsidiaries and affiliates if the subsidiaries and affiliates are within its control.<sup>326</sup>

*c. Did the Taylor Court Go Too Far?*

Sinclair and Fendrich discuss in detail how far courts have gone or should go in requiring corporations to marshal facts and synthesize an entire case for their opponents.<sup>327</sup> The authors make a cogent argument that the *Taylor* court went too far in requiring a corporation to present, through its corporate representative, the corporation's knowledge, its subjective beliefs and opinions, and its interpretation of documents and events.<sup>328</sup> As they state, "There is no basis in the Rule or its legislative history for infusing the Rule 30(b)(6) deposition with such a function."<sup>329</sup> Instead, Sinclair & Fendrich argue that contention interrogatories are the proper discovery

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<sup>322</sup>No. 01 CIV. 3016 (AGS)(HBP), HB), 2002 WL 1835439, at \*1(S.D.N.Y. Aug. 8, 2002).

<sup>323</sup>*Id.*

<sup>324</sup>*Id.* at \*3 (citing *Am. Rockwool, Inc. v. Owens-Corning Fiberglass Corp.*, 109 F.R.D. 263, 266 (E.D.N.C. 1985); *Westinghouse Credit Corp. v. Mountain States Mining & Milling Co.*, 37 F.R.D. 348, 349 (D. Colo. 1965).

<sup>325</sup>*Twentieth Century Fox*, 2002 WL 1835439 at \*4; *Dietrich v. Bauer*, No. 95 Civ. 7051(RWS), 2000 WL 1171132, at \*3 (S.D.N.Y. Aug. 16, 2000)).

<sup>326</sup>*Twentieth Century Fox*, 2002 WL 1835439, at \*2; see also *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1144–45 (N.D. Ill. 1979).

<sup>327</sup>Sinclair & Fendrich, *supra* note 7, at 651.

<sup>328</sup>*Id.* at 710–11.

<sup>329</sup>*Id.* at 710.

device for exploring a corporation's beliefs, opinions and interpretations.<sup>330</sup> They also note that one judge approved a holding concluding "contention interrogatories are not just a viable alternative, but the proper discovery device under the circumstances."<sup>331</sup>

Unless one has great confidence in the corporate representative's ability to field questions about the corporation's contentions in an adversarial setting in which opposing counsel generally has the upper hand, one should volunteer to respond to contention interrogatories, even if such would exceed the limit on the number of interrogatories to which one is required to respond, or seek a protective order requiring the opposing party to proceed using contention interrogatories.

### 3. Consequences of Failing to Disclose

One court has held that the appearance by an inadequately prepared witness is the equivalent of a non-appearance.<sup>332</sup> However, even a well prepared witness at times cannot answer all the questions posed, particularly if the subject matters have been broadly designated. The consequences of an inability to answer depend largely on how the failure came about and whether the area of inquiry is on a subject that is important in the organization's own case.

If a corporation fails to meet its obligations to investigate and select an appropriate witness to testify, the court can impose a variety of sanctions under Federal Rule 37.<sup>333</sup> Federal Rule 37 provides that if a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation fails to make a designation under Rule 30(b)(6), the discovering party may move for an order *compelling an answer, or a designation*.<sup>334</sup> An evasive or incomplete answer is to be treated as a failure to disclose, answer or respond.<sup>335</sup> If the motion to compel is granted, the court shall award reasonable expenses incurred in making the motion, including attorney's

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<sup>330</sup> *Id.* at 713.

<sup>331</sup> *Id.* at 714 (quoting *SEC v. Morelli*, 143 F.R.D. 42, 48 (S.D.N.Y. 1992)).

<sup>332</sup> *Bank of N.Y. v. Meridien BIAO Bank Tanz., Ltd.*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997) (stating that a witness's inability to answer questions on designated subjects was tantamount to a non-appearance); *see also Allstate Tex. Lloyds v. Johnson*, 784 S.W.2d 100, 103-04 (Tex. App.—Waco 1989, no writ) (stating that an assertion of privileges barring answers to questions resulted in the failure to provide a witness able to answer as required).

<sup>333</sup> FED. R. CIV. P. 37.

<sup>334</sup> FED. R. CIV. P. 37(a)(3)(B).

<sup>335</sup> FED. R. CIV. P. 37(a)(4).

fees, to the moving party.<sup>336</sup> If a party or an officer, director or managing agent of a party or a person designated under Federal Rule 30(b)(6) *fails to obey an order* to provide or permit discovery, the court in which the action is pending is authorized to make such orders as may be just, including that designated facts be established, that the disobedient party be prohibited from presenting certain claims or defenses or from introducing certain evidence, ordering that pleadings be stricken or that the action be dismissed with fees and costs imposed on the disobedient party.<sup>337</sup> If a party or an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) fails to appear for his deposition, the court may issue any of the orders provided under Rule 37(b)(2)(A), (B), or (C) along with reasonable expenses, including attorney's fees.<sup>338</sup> Thus, when the courts note that the failure of a corporation to present a properly prepared witness is the equivalent of a failure to attend, they escalate the potentially escalated sanctions from those provided under Federal Rule 37(a)(3) (an order to cooperate in discovery)<sup>339</sup> to those available under Federal Rule 37(b)(2)(A)(i)–(vii) (declaring facts established, barring evidence, striking pleadings, claims or defenses or even dismissing the case).<sup>340</sup>

As a practical matter, the failure to produce a prepared witness is not treated as justifying imposition of the catastrophic sanctions the court's rhetoric might lead one to believe would be available.<sup>341</sup> For example, in *Resolution Trust Corp. v. Southern Union Co.*, the court found that RTC had presented two witnesses in response to a 30(b)(6) notice designating ten subject matters for inquiry without making any effort to determine whether the designated witnesses had relevant knowledge or even to review documents or produce documents within its possession to determine who would be able to testify.<sup>342</sup> RTC argued that it was obliged only to produce witnesses who *might* have pertinent knowledge.<sup>343</sup> In rejecting that contention, the Fifth Circuit noted that the deposition of a corporation under Rule 30(b)(6) “places the burden of identifying responsive witnesses for a

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<sup>336</sup>FED. R. CIV. P. 37(a)(5)(A).

<sup>337</sup>FED. R. CIV. P. 37(b)(2).

<sup>338</sup>FED. R. CIV. P. 37(b)(C).

<sup>339</sup>FED. R. CIV. P. 37(a)(3).

<sup>340</sup>FED. R. CIV. P. 37(b)(2)(A).

<sup>341</sup>See, e.g., Sinclair & Fendrich, *supra* note 7, at 744.

<sup>342</sup>985 F.2d 196, 197 (5th Cir. 1993).

<sup>343</sup>*Id.*

corporation on the corporation.”<sup>344</sup> Thus, where the corporation has information within the scope of the 30(b)(6) deposition notice readily available to it, the corporation is no more able to evade production of that information through an unprepared corporate representative than it would be to fail to produce documents or other tangible things within its possession, custody or control in response to a request for documents.<sup>345</sup> The court found that RTC manifestly “did not make a meaningful effort to acquit its duty to designate an appropriate witness.”<sup>346</sup> Despite that, the trial court did not impose the severe sanctions authorized by Federal Rule 37(b)(2)(A)–(C).<sup>347</sup> Instead, the trial court awarded, and the Fifth Circuit affirmed, sanctions under Federal Rule 37(d), including costs and fees incurred by the discovering counsel in traveling from Washington, D.C. to Dallas for the deposition and in identifying another witness who was able to address the designated subjects.<sup>348</sup>

As one court held, “[i]n order for the Court to impose sanctions, the inadequacies in a deponent’s testimony must be egregious and not merely lacking in desired specificity in discrete areas.”<sup>349</sup> Moreover, “because sanctions that prohibit a party from introducing evidence are typically reserved for only flagrant discovery abuses,” they should not be imposed for simple failures to respond to some questions.<sup>350</sup> Thus, even though the *Bank of New York* court found that the corporation had presented a corporate representative who was wholly unable to render testimony regarding one of the three subject areas for which he was designated, and that consequently, his performance amounted to a non-appearance, the court not only declined to bar evidence as a sanction on that subject, it declined even to award costs.<sup>351</sup>

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<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at 197–98.

<sup>347</sup> *Id.* at 198.

<sup>348</sup> *Id.* at 197–98. The Second Circuit has taken an even more lenient posture on this issue than did the Fifth Circuit in *Southern Union*. In *Salahuddin v. Harris*, 782 F.2d 1127, 1131 (2d Cir. 1986), the court held that a witness must first disobey a court order before sanctions can be imposed. The Fifth Circuit rejected this predicate as inapplicable on a deposition conducted under Federal Rule 30(b)(6). *Southern Union*, 985 F.2d at 197.

<sup>349</sup> *Bank of N.Y. v. Meridien BIAO Bank Tanz., Ltd.*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997) (quoting *Zappia Middle E. Constr. Co., Ltd. v. Abu Dhabi*, No. 94 Civ. 1942, 1995 WL 686715, at \*8 (S.D.N.Y. Nov. 17, 1995)).

<sup>350</sup> *Id.* at 151–52.

<sup>351</sup> *Id.*



This is not intended to suggest that a corporation may take lightly its obligation to cooperate in producing a witness fully prepared to respond to a corporate representative deposition notice. As will be seen below, at times even good faith attempts to comply that fall short can have disastrous consequences.

*a. Failure to Adequately Seek Out Information Relevant to Corporation's Own Case*

Even where a corporate representative appears and answers questions to the best of his ability, a corporate party may still find itself barred from presenting evidence on issues the corporate representative was unable to address. If a corporation fails to make a full and fair response to questions that relate to its position in the law suit because of a lack of information (as noted in *Dravo*<sup>352</sup>), it may be barred from presenting evidence on those subjects at trial, even from third parties or third party documents.<sup>353</sup> If an organization fails to seek out and obtain all facts, testimony, documents, and interpretations for disclosure to the opposing party through the Rule 30(b)(6) deposition that it desires to offer at trial, the organization will leave itself in a position in which it must convince the court that the evidence was not “reasonably available” to it during the deposition but became such in time for trial—not a high percentage move.<sup>354</sup> The *Taylor Court* specifically noted that:

If a corporation has knowledge or a position as to a set of alleged facts or an area of inquiry, it is its officers, employees, agents or others who must present the position, give reasons for the position, and, more importantly, stand subject to cross-examination. A party's trial attorney normally does not fit that bill. Therefore, if a party states it has no knowledge or position as to a set of alleged facts or area of inquiry at a Rule 30(b)(6) deposition, it cannot

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<sup>352</sup>*Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 76 (D. Neb. 1995); *see also* *Starlight Int'l Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D. Kan. 1999) (sanctioning defendants for their failure to prepare a 30(b)(6) representative to testify about information within the corporations' knowledge); 7 MOORE ET AL., *supra* note 16, § 30.25[3], at 30-72-73.

<sup>353</sup>*See* *United States v. Taylor*, 166 F.R.D. 356, 361-62 (M.D.N.C. 1996), *aff'd by*, 166 F.R.D. 367 (M.D.N.C. 1996).

<sup>354</sup>*Id.* at 362.

argue for a contrary position at trial without introducing evidence explaining the reasons for the change.<sup>355</sup>

The *Taylor* Court concluded that Union Carbide could not review previous deposition testimony and documents after the Rule 30(b)(6) deposition had concluded to determine its corporate position—"[t]he time for preparation is now."<sup>356</sup> If at its Rule 30(b)(6) deposition the designated corporate representative asserts no knowledge and no position on a topic, counsel for the corporation will be foreclosed from asserting any interpretation of the facts presented at trial.<sup>357</sup> The corporation is required to do a thorough investigation before the deposition, not just before trial.<sup>358</sup> While acknowledging that Rule 30(b)(6) places a significant burden on a corporation, it noted that such was the price for the privilege of being able to do business under the corporate form.<sup>359</sup>

The consequences of a failure to properly provide information requested in a Rule 30(b)(6) notice can be Draconian. *Rainey v. American Forest and Paper Ass'n* is a good example of how courts and opposing counsel can and have turned the "field leveling" intent of Rule 30(b)(6) into a powerful offensive weapon against corporate parties.<sup>360</sup> Rainey sued American Forest & Paper Assoc. ("AFP") under the Fair Labor Standards Act,<sup>361</sup> seeking a declaratory judgment and damages for failure to pay overtime for excess hours worked.<sup>362</sup> Plaintiff's summary judgment motion raised, among other issues, the question of whether plaintiff fell within the exemption applying to individuals "employed in a bona fide . . . administrative . . . capacity."<sup>363</sup> In opposition to plaintiff's motion, defendant proffered the deposition testimony of its designated corporate representative and a former employee's affidavit, the "Kurtz affidavit."<sup>364</sup>

Plaintiff had issued a Rule 30(b)(6) notice to AFP for corporate representative(s) to testify regarding her "employment history with

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<sup>355</sup> *Id.* (footnotes omitted).

<sup>356</sup> *Id.* at 363.

<sup>357</sup> *Id.* at 362–63.

<sup>358</sup> *See id.*

<sup>359</sup> *Id.* at 362.

<sup>360</sup> *See generally* 26 F. Supp. 2d 82 (D.D.C. 1998).

<sup>361</sup> Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (1994 & Supp. II 1996).

<sup>362</sup> *Rainey*, 26 F. Supp. 2d at 86.

<sup>363</sup> *Id.* at 87 (quoting 29 U.S.C. § 213(a)(1)).

<sup>364</sup> *Id.*

[d]efendant [sic] including positions held, duties, hours worked, supervisors and representations made to [p]laintiff by defendant and its employees.”<sup>365</sup> Two corporate representatives were designated to respond to plaintiff’s notice.<sup>366</sup> The court noted that the first, Mr. Hoagland, was not designated to answer specific questions concerning plaintiff’s employment as he was not hired by defendant until after plaintiff resigned.<sup>367</sup> “It therefore is expected that he would profess no personal knowledge about the particular circumstances of plaintiff’s employment.”<sup>368</sup> The other corporate representative designated to testify, Mr. Kirshner, stated AFP’s position that plaintiff’s duties were exempt in nature, but he was unable to provide specifics about the nature of plaintiff’s duties or the allocation of her time to back up those conclusions.<sup>369</sup> For example, he was unable to answer questions about what percentage of plaintiff’s time would have been spent on what would have been considered exempt functions, and stated that he did not know the specific nature of duties that plaintiff performed, or whether they were clerical or administrative.<sup>370</sup> The court held, as a matter of law, that Kirshner’s conclusory testimony was insufficient to create genuine issues of material fact.<sup>371</sup> Thus, Rule 30(b)(6) testimony unsupported by personal knowledge and other foundational requirements of the Rules of Evidence was inadmissible on behalf of the corporation providing it.<sup>372</sup> (As noted above, the same would not be true of evidence offered against the corporation from the Rule 30(b)(6) deposition.)<sup>373</sup>

Next, the court turned to the affidavit of AFP’s former employee, Ms. Kurtz.<sup>374</sup> This affidavit was offered to establish that plaintiff’s duties fell within the statutory exemption.<sup>375</sup> Ms. Kurtz’s affidavit was based on

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<sup>365</sup> *Id.* at 92.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *Id.* at 93.

<sup>370</sup> *Id.* at 92–93.

<sup>371</sup> *Id.* at 93.

<sup>372</sup> *See id.* at 92–93; *see, e.g.*, FED. R. EVID. 602; FED. R. EVID. 701; FED. R. EVID. 804; FED. R. CIV. P. 32(a)(3); *United States v. Taylor*, 166 F.R.D. 356, 359 (M.D.N.C. 1996), *aff’d by*, 166 F.R.D. 367 (M.D.N.C. 1996); 7 MOORE ET AL., *supra* note 16, § 32.21[2][a] & [b], at 32–25–26; WRIGHT ET AL., *supra* note 9, § 2144, at 167; *see also*, TEX. R. EVID. 602; TEX. R. EVID. 701; TEX. R. EVID. 804.

<sup>373</sup> *See* FED. R. CIV. P. 32(a)(4); FED. R. EVID. 801(d)(2); TEX. R. EVID. 801(e)(2).

<sup>374</sup> *Rainey*, 26 F. Supp. 2d at 93–94.

<sup>375</sup> *See id.*

personal knowledge of plaintiff's day-to-day duties and responsibilities while both were employed by AFP.<sup>376</sup> Plaintiff challenged consideration of the affidavit on the ground that the matters covered therein were within the scope of the Rule 30(b)(6) notice but AFP had presented no representative to testify about them.<sup>377</sup> Defendant did not contest that Ms. Kurtz had not been presented as a corporate representative nor did it argue that all information contained in Ms. Kurtz's affidavit had been covered by its designated corporate representatives, Kirshner and Hoagland.<sup>378</sup> The court held that Rule 30(b)(6) prohibits the later introduction of information within the scope of the designated subject matter of the deposition "[u]nless [the producing party] can prove that the information was not known or was inaccessible."<sup>379</sup>

AFP argued that Ms. Kurtz's testimony fell within the exception to the rule since it had no legal duty to designate a former employee and that the responses of Mr. Kirshner at his deposition evidenced adequate preparation for his deposition.<sup>380</sup> The court agreed that AFP had "no duty to designate any particular individual" and that Mr. Kirshner displayed familiarity with the areas of inquiry.<sup>381</sup> However, it noted that plaintiff was not seeking Rule 37 sanctions for improper designation or inadequate preparation of defendant's witnesses.<sup>382</sup> Instead, she sought to prevent consideration of legal and factual positions that varied materially from those taken by the corporate representatives.<sup>383</sup> The court held that since AFP had not made a showing that the facts set out in the affidavit were not reasonably available to it at the time of the depositions, Rule 30(b)(6) required that the requested relief be granted.<sup>384</sup>

While one might take issue with the court's statement that AFP was asserting legal and factual positions that were materially different from those taken by its witnesses at their 30(b)(6) depositions, it is clear that it

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<sup>376</sup> *Id.*

<sup>377</sup> *Id.* at 94.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.* (citing *Ierardi v. Lorillard, Inc.*, No. CIV.A.90-7049, 1991 WL 158911, at \*3 (E.D. Pa. Aug. 13, 1991); see also *United States v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996), *aff'd by*, 166 F.R.D. 367 (M.D.N.C. 1996)).

<sup>380</sup> *Rainey*, 26 F. Supp. 2d at 95.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

was attempting to offer evidence of facts that it had not presented at those depositions.<sup>385</sup> The court noted Rule 30(b)(6) was aimed at preventing a corporate defendant from thwarting inquiries during discovery and then staging an ambush during a later phase of the case.<sup>386</sup> The fact that no one still working for AFP could have testified based on personal knowledge was no excuse.<sup>387</sup> The court noted that:

If Ms. Kurtz was—as her affidavit suggests—so closely involved with the human resources department while plaintiff worked there, surely the information she has come forward with was equally well-known at the time plaintiff sought to depose a corporate representative. Defendant’s failure to produce it then—either by designating Ms. Kurtz as its representative or by preparing its designees to present what Kurtz knew—clearly violated Rule 30(b)(6).<sup>388</sup>

As observed by the court, the fact that AFP was able to obtain Ms. Kurtz’s cooperation in making the affidavit, is evidence that it could have obtained her cooperation in acting as a corporate representative or as a source of the information to be presented by its designated representatives.<sup>389</sup> However, AFP certainly had no ability to force a former employee to accept the role of corporate representative.<sup>390</sup>

Perhaps most significantly, the court rejected AFP’s argument that there had been no ambush of plaintiff because throughout the deposition of its corporate representatives, Ms. Kurtz had been identified as someone knowledgeable about plaintiff’s hours of work.<sup>391</sup> The court refused to consider the affidavit of Ms. Kurtz and refused to put the burden on plaintiff to depose her at that point.<sup>392</sup> The court struck Kurtz’s affidavit, found that AFP therefore had failed to present evidence in opposition to plaintiff’s motion raising a genuine issue of material fact, and entered

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<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* at 95 n.3.

<sup>388</sup> *Id.* at 95 (footnote omitted).

<sup>389</sup> *Id.* at 95 n.3.

<sup>390</sup> *Id.* “The named organization must then designate one or more officers, directors, or managing agents, or designate other persons *who consent to testify on its behalf* . . . .” FED. R. CIV. P. 30(b)(6) (emphasis added).

<sup>391</sup> *Rainey*, 26 F. Supp. 2d at 95.

<sup>392</sup> *Id.* at 96.

summary judgment for plaintiff.<sup>393</sup> Pointing plaintiff to the bush where the bird was and telling her to go sniff it out for herself was just not good enough under Rule 30(b)(6) in the *Rainey* court's opinion.<sup>394</sup> As noted above, the Southern District of New York in *Bank of New York* agreed in similar circumstances that Rule 30(b)(6) had not been complied with but declined to strike testimony, observing that:

[B]ecause sanctions that prohibit a party from introducing evidence are typically reserved for only flagrant discovery abuses, BNY is not entitled to an order declaring Mr. Mbang's deposition testimony to be the sole proof of DIB's document production for purposes of this motion, or to an order precluding DIB from submitting the affidavits of [its other witnesses] as proof of DIB's production efforts in this case.<sup>395</sup>

The *Rainey* court appears to have gone too far.<sup>396</sup>

*b. Corp Corporate Representative*

Under the rationale of *Rainey*, plaintiff's motion for summary judgment against Corp may very well succeed. Under the rule of *Industrial Hard*

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<sup>393</sup> *Id.* at 96–98.

<sup>394</sup> *But see* *Indus. Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000) (holding plaintiff's motion *in limine* to exclude evidence contradicting testimony given during defendant's Rule 30(b)(6) deposition denied; while corporation bound by Rule 30(b)(6) testimony, such does not constitute a judicial admission and, like any other deposition testimony can be contradicted and used for impeachment purposes); *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 992–93 (E.D. La. 2000), *aff'd by*, 31 Fed. Appx. 151 (5th Cir. 2001); *W.R. Grace & Co. v. Viskase Corp.*, No. 90C5383, 1991 WL 211647, at \*2 (N.D. Ill. Oct. 15, 1991) (corporate party may offer evidence at trial contrary to statements made by its corporate representative in a Rule 30(b)(6) deposition).

<sup>395</sup> *Bank of N.Y. v. Meridien BIAO Bank Tanz. Ltd.*, 171 F.R.D. 135, 151–52 (S.D.N.Y. 1997).

<sup>396</sup> In Texas, the trial court appears to be required to impose a lesser sanction before it can bar evidence when such a bar order would be the equivalent of a directed verdict on a party's case, as occurred in *Rainey*. *See, e.g., Adkins Servs., Inc. v. Tisdale Co.*, 56 S.W.3d 842, 845 (Tex. App.—Texarkana 2001, no pet.) (“Any sanction that adjudicates a claim and precludes the presentation of the merits of the case constitutes a death penalty sanction. . . . [A]ny sanction that is case determinative may constitute a death penalty sanction.”). Among other conditions precedent to the imposition of a death penalty sanction, the court must first impose lesser sanctions to test their effectiveness in securing compliance. *Id.*

*Chrome* and similar cases, it may not.<sup>397</sup> If the rule stated in *Adkins* and *Bank of New York* is applied to corporate representative depositions, as it should be, the corporation should be given an opportunity to respond further before the presentation of evidence critical to its case is barred.<sup>398</sup>

#### 4. What Can a Corporate Party Do to Protect Its Ability to Present Evidence When The Necessary Information Is in The Hands of Third Parties?

In *Rainey*, AFP clearly was able to obtain an affidavit from Kurtz in opposition to plaintiff's motion for summary judgment and, therefore, she appears to have been cooperating with AFP.<sup>399</sup> If so, it would seem that all AFP had to do was to interview her and incorporate her information into the testimony of the designated corporate representatives. That appears to have been the court's point. While their Rule 30(b)(6) representative's hearsay testimony based on their interview of Kurtz would not have been admissible in opposition to the motion for summary judgment,<sup>400</sup> by disclosing the facts during the Rule 30(b)(6) deposition, AFP then would have been free to present Ms. Kurtz' properly founded testimony by way of affidavit in opposition to plaintiff's motion for summary judgment.<sup>401</sup>

What can a corporation do if its former employees or other third-party witnesses refuse to cooperate with the corporation's investigation? In such circumstances, a corporation could take the former employee's deposition under subpoena at which its opponent would hear the same testimony it heard.<sup>402</sup> Would this alone have satisfied the *Rainey* court? Perhaps not, since that same remedy was available to plaintiff once AFP's corporate representative disclosed AFP's contentions regarding the facts and the identity of persons with knowledge of those facts. Instead, if *Rainey* is to be accepted as correctly describing the scope of the corporation's duty, it seemingly must go further by taking the deposition of third-party witnesses

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<sup>397</sup> *Indus. Hard Chrome*, 92 F. Supp. 2d at 791.

<sup>398</sup> *Adkins Servs.*, 56 S.W.3d at 845; *Bank of N.Y.*, 171 F.R.D. at 151-52.

<sup>399</sup> See *Rainey v. Am. Forest & Paper Ass'n*, 26 F. Supp. 2d 82, 95 n.3 (D.D.C. 1998).

<sup>400</sup> See, e.g., *United States v. Taylor*, 166 F.R.D. 356, 359 (M.D.N.C. 1996), *aff'd by*, 166 F.R.D. 367 (M.D.N.C. 1996); *W.R. Grace & Co. v. Viskase Corp.*, No. 90C5383, 1991 WL 211647, at \*2 (N.D. Ill. Oct. 15, 1991).

<sup>401</sup> In fact, the court found that even if it had considered Kurtz's affidavit, it would not have been sufficient to have presented a material, triable issue of fact under Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(1) (1994). See *Rainey*, 26 F. Supp. 2d at 96.

<sup>402</sup> FED. R. CIV. P. 30(a)(1).

and then incorporating the information into the testimony of its corporate representative.<sup>403</sup>

### 5. Further Thoughts on *Taylor* And *Rainey*

It is difficult to reconcile the *Rainey* court's statement that it was not requiring AFP to "facilitate preparation of its opponent's legal case" with the practical effect of its holding.<sup>404</sup> Because AFP did not conduct discovery of third-party witnesses for Plaintiff (either by way of interview or deposition), witnesses of whom Plaintiff was fully aware, both in terms of their identity and the relevance of their information, the court refused to allow AFP to present that evidence—a very fine distinction.<sup>405</sup> Clearly, parties not subject to Rule 30(b)(6) have no such obligation and are free to "stag[e] an ambush during a later phase of the case."<sup>406</sup> Despite the court's denial, it clearly seems to have imposed through Rule 30(b)(6) a sanction on the corporate party for failing to facilitate preparation of its opponent's case, while rewarding that opponent's tactical decision not to depose a witness she had been told had actual knowledge of the facts on which the corporation would rely to support its position.<sup>407</sup>

How far can one take the rationale of *Rainey*? The court did not find that the designation of the witnesses had been improper or that the corporation in fact had persons within its ranks who could have testified from personal knowledge or from the investigation that had already been conducted.<sup>408</sup> Even though the witnesses had apparently clearly articulated the corporation's legal defense and identified the witness who had personal knowledge of the facts and on whom it ultimately sought to rely, the court

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<sup>403</sup> See *Rainey*, 26 F. Supp. 2d at 94–95. See also *Taylor*, 166 F.R.D. at 363 (corporation may not review previous deposition testimony and documents previously produced in discovery after the 30(b)(6) deposition has concluded to then determine its corporate position).

<sup>404</sup> *Rainey*, 26 F. Supp. 2d at 95.

<sup>405</sup> See *id.* at 95–96.

<sup>406</sup> *Id.* at 95.

<sup>407</sup> If plaintiffs had a right to demand a witness with personal knowledge, then under the rationale of *Rainey*, they could truly put the producing corporation in a no-win position. If the corporation had no employees with personal knowledge, then they could only present through representatives under their own control, only witnesses who could present whatever information they were able to adduce through investigation. But if that was not sufficient to satisfy the requirements of Rule 30(b)(6), then they would be barred from presenting third-party witnesses who could testify from personal knowledge at trial. Clearly, this is not the rule.

<sup>408</sup> See *Rainey*, 26 F. Supp. 2d at 95–96.



held that the corporation failed to meet its burden under Rule 30(b)(6) to present information “reasonably available” to it.<sup>409</sup> The *Rainey* opinion would seem to promote form over substance. *Rainey* would also seem to be contrary to *Bank of New York* and *Adkins*, in which the Southern District of New York and the Texarkana Court of Appeals, respectively, concluded that barring testimony was a sanction to be reserved only for the most severe discovery abuses.<sup>410</sup> There is nothing in the *Rainey* case that would seem to justify the sanction imposed.

Be that as it may, the lopsided burden on corporations and organizations is fairly clear. The implicit limitation on the *Rainey* court’s reasoning is the “reasonably available” requirement of Rule 30(b)(6).<sup>411</sup> If the information was not “reasonably available,” there was no obligation to present it.<sup>412</sup> But of course any factual information that is ultimately located and available for presentation at trial is information that in theory could have been located through investigation and presented during a Rule 30(b)(6) deposition. Carried to its logical extreme, that would mean that corporations (and other organizations subject to Rule 30(b)(6)), are required to lay out their entire case, or at least as much of it as has been requested under the Rule, to their opponents during discovery and that there is no obligation whatsoever on the opponent to do their own homework. Does *Rainey* in fact mean that parties can shift to their corporate opponent the duty to do their homework for them, at the peril of the corporate party? Apparently so in some jurisdictions, but surely that is not what the drafters intended of Federal Rule 30(b)(6) in order to stop “bandying” about.<sup>413</sup>

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<sup>409</sup> *Id.* at 95.

<sup>410</sup> *Bank of N.Y. v. Meridien BIAO Bank Tanz. Ltd.*, 171 F.R.D. 135, 151–52 (S.D.N.Y. 1997); *Adkins Servs., Inc. v. Tisdale Co.*, 56 S.W.3d 842, 845–46 (Tex. App.—Texarkana 2001, no. pet.).

<sup>411</sup> FED. R. CIV. P. 30(b)(6).

<sup>412</sup> *See, e.g., Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 76 (D. Neb. 1995).

<sup>413</sup> *Rule 30 Notes, supra* note 9, § (b)(6), at 185.

*E. May The Corporate Party Supplement or Amend The Testimony Given by Its Corporate Representative?*

1. Is A Corporate Party Stuck with Its Representative's Lack of Knowledge or Incorrect Answers?

A problem that is related to the *Rainey* issue (in which the corporation failed to present certain facts through the corporate representative deposition) is the situation in which the witness testifies to the best of his ability but gives an answer that the corporation realizes was incomplete or incorrect. Thus, the situation is that inaccurate information, from the corporation's perspective, has arguably been given rather than no information.

While all courts seem to agree that the testimony of both Rule 30(b)(1) officers, directors and managing agents and Rule 30(b)(6) corporate representatives is the testimony of the corporation,<sup>414</sup> and that as such it "binds" the corporation,<sup>415</sup> there is a split in the authorities as to the practical impact of this testimony. In other words, to what extent is such testimony rebuttable like the testimony of any other witness, including other corporate employees?

What is unclear in the cases is what it means to "bind" the corporation. As discussed above, a corporation has been prevented from defeating a motion for summary judgment based upon an affidavit which conflicts with its Rule 30(b)(6) deposition.<sup>416</sup> However, in *Industrial Hard Chrome, Ltd. v. Hetran, Inc.*, plaintiff's motion *in limine* to exclude evidence contradicting testimony given during defendant's Rule 30(b)(6) deposition was denied, with the court observing that while a corporation is bound by its Rule 30(b)(6) testimony, such does not constitute a judicial admission and, like any other deposition, such testimony can be contradicted.<sup>417</sup>

Although an unpublished opinion, *W.R. Grace & Co. v. Viskase Corp.* is often cited in published decisions on this point. The *W.R. Grace* court notes that "Viskase argues that Grace is bound by its Rule 30(b)(6) deposition

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<sup>414</sup> See, e.g., *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 992–93 (E.D. La. 2000), *aff'd* by, 31 Fed. Appx. 151 (5th Cir. 2001) ("In a Rule 30(b)(6) deposition, there is no distinction between the corporate representative and the corporation.").

<sup>415</sup> See 7 MOORE ET AL., *supra* note 16, §§ 30.25[3], 32.21[2][a].

<sup>416</sup> *Hyde*, 107 F. Supp. 2d at 993.

<sup>417</sup> 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000) (citing *W.R. Grace & Co. v. Viskase Corp.*, No. 90C5383, 1991 WL 211647, at \*2 (N.D. Ill. Oct. 15, 1991)).

testimony as a matter of law” and is precluded from introducing any evidence that is contrary to statements made in its Rule 30(b)(6) depositions.<sup>418</sup> The court rejected the consequence of the rule asserted by Viskase, noting that:

It is true that a corporation is “bound” by its Rule 30(b)(6) testimony, in the same sense that any individual deposed under Rule 30(b)(1) would be “bound” by his or her testimony. All this means is that the witness has committed to a position at a particular point in time. It does not mean that the witness has made a judicial admission that formally and finally decides an issue. Deposition testimony is simply evidence, nothing more. Evidence may be explained or contradicted. Judicial admissions, on the other hand, may not be contradicted.<sup>419</sup>

Unfortunately, the court does not discuss what the testimony was that *W.R. Grace* sought to contradict. Thus, we cannot tell from the opinion whether the testimony was like that in *Rainey* in which the corporation’s representative failed to disclose information within the subject matter of the Rule 30(b)(6) notice and then later attempted to present such evidence<sup>420</sup> or, as in *Hyde*, the corporation admitted an element of its opponent’s case in the Rule 30(b)(6) deposition and later attempted to contradict the admitted fact.<sup>421</sup>

The *Industrial Hard Chrome* opinion is no more illuminating than the *W. R. Grace* opinion. While the *Industrial Hard Chrome* court makes the statement that Rule 30(b)(6) testimony binds a corporation but is not a judicial admission and, therefore, can be freely contradicted like any other evidence, it too does so without discussing the evidence at issue.<sup>422</sup> Thus, it is difficult to discern precisely what the case means.

However, in *A.I. Credit Corp. v. Legion Insurance Co.*, the Seventh Circuit specifically rejected the holding in *Rainey*.<sup>423</sup> In *A.I. Credit*, the court was faced with a claim that a corporation could not oppose a motion for summary judgment based on testimony that contradicted that of its Rule

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<sup>418</sup> *W.R. Grace*, 1991 WL 211647, at \*2.

<sup>419</sup> *Id.* (citations omitted).

<sup>420</sup> See *Rainey v. Am. Forest & Paper Ass’n*, 26 F. Supp. 2d 82, 93–95 (D.D.C. 1998).

<sup>421</sup> See 107 F. Supp. 2d at 992–93.

<sup>422</sup> See 92 F. Supp. 2d at 791.

<sup>423</sup> *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001).

30(b)(6) corporate representative.<sup>424</sup> There, the corporation sought to contradict the testimony of its corporate representative by showing that he never spoke with the moving party in a conference call.<sup>425</sup> The Seventh Circuit held that the sentence in Rule 30(b)(6) stating that “The persons so designated shall testify as to matters known or reasonably available to the organization” cannot be read absolutely to bind a corporate party to its designee’s testimony.<sup>426</sup> Not only did the court find that nothing in the advisory committee notes indicated that the Rule should go so far, it specifically rejected the holding of *Rainey*<sup>427</sup> in favor of the holdings in *Industrial Hard Chrome*<sup>428</sup> and *Taylor*<sup>429</sup> by concluding that “testimony of Rule 30(b)(6) designee does not bind corporation in sense of judicial admission.”<sup>430</sup> The court considered the contradictory testimony and found that an issue of fact existed.<sup>431</sup>

As noted by Sinclair & Fendrich, Rule 30(b)(6) testimony does not bind a corporation as a matter of law in the sense that matters admitted cannot be controverted.<sup>432</sup> Instead, a corporation is “bound” in the same sense as any other witness: “the witness has committed to a position at a particular point in time; it does not mean that the witness has made a *judicial admission* that formally and finally decides an issue. . . . Such evidence may be explained or contradicted.”<sup>433</sup> Presumably the *Rainey* and *Hyde* courts would disagree.

It is difficult to reconcile the *Rainey/Hyde* line of cases with the *Industrial Hard Chrome/A.I. Credit* line of cases. One might be tempted to argue that these cases can be harmonized by distinguishing between attempts to introduce evidence on a subject as to which its Rule 30(b)(6)

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<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

<sup>426</sup> *Id.* The text of the rule has since been amended and now reads, “The persons designated must testify about information known or reasonably available to the organization.” FED. R. CIV. P. 30(b)(6).

<sup>427</sup> *Rainey v. Am. Forest & Paper Ass’n*, 26 F. Supp. 2d 82, 93 (D.D.C. 1998). at 94.

<sup>428</sup> *Indus. Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000).

<sup>429</sup> *United States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996), *aff’d by*, 166 F.R.D. 367 (M.D.N.C. 1996).

<sup>430</sup> *A.I. Credit*, 265 F.3d at 637.

<sup>431</sup> *Id.*

<sup>432</sup> Sinclair & Fendrich, *supra* note 7, at 730.

<sup>433</sup> Sinclair & Fendrich, *supra* note 7, at 730–31; *see also* Wollin & Millsom, *supra* note 22, at 35 (“An entity is bound by its Rule 30(b)(6) testimony, in the same sense that an individual deposed under Rule 30 would be bound by his or her testimony.”).

representative testified he had no information, such as in *Rainey*,<sup>434</sup> from those situations in which a corporation sought to contradict prior positive testimony on some fact at issue, such as whether the corporation was involved in a particular conversation, as in *A. I. Credit*.<sup>435</sup> However, such effort would founder on the shoals created by cases such as *Hyde*.<sup>436</sup> Citing several cases, the *Hyde* court did, however, acknowledge that there may be instances in which contradiction of the prior affirmative testimony of a corporate representative may be excusable if accompanied by a reasonable explanation.<sup>437</sup> It is difficult to logically suggest that there should be a more severe penalty for not knowing an answer than for providing an incorrect one. As is apparent from *A.I. Credit*, the courts are simply in conflict on this point.<sup>438</sup> Thus, the field is open for argument.

## 2. What Should A Corporation Do When It Learns That Prior Answers of Its Representative Were Incorrect or Incomplete?

So what should a corporation do upon learning that information is in fact available on a subject matter as to which the corporation's 30(b)(6) witness previously disavowed knowledge, or provided an incorrect answer?

The simple answer is to designate additional witnesses to testify—at least as to those areas of inquiry the witness was unable to address—and the

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<sup>434</sup> *Rainey v. Am. Forest & Paper Ass'n*, 26 F. Supp. 2d 82, 93 (D.D.C. 1998).

<sup>435</sup> 265 F.3d at 637.

<sup>436</sup> *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 992–93 (E.D. La. 2000), *aff'd by*, 31 Fed. Appx. 151 (5th Cir. 2001) (corporation attempted to offer affidavit in opposition to motion for summary judgment contradicting unequivocal testimony of its corporate representative that the hammer at issue was in fact manufactured by defendant).

<sup>437</sup> *Id.* at 993; *see also* *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495–96 (5th Cir. 1996) (affidavit of president of the company 18 months after giving contradictory deposition testimony without explanation disregarded); *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir. 1980) (affidavit not stricken despite some conflict with prior deposition where affiant may have been confused in prior deposition and affidavit not inherently inconsistent with prior testimony); *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578–79 (2d Cir. 1969) (affidavit which contradicted deposition testimony without explanation held not to create genuine issue of material fact that would defeat summary judgment).

<sup>438</sup> 265 F.3d at 637. One unpublished federal case, *Super Future Equities, Inc. v. Wells Fargo Bank Minnesota, N.A.*, has addressed the issue, finding that a corporation may not introduce evidence on a topic when its representative testified that he had no evidence on that topic during a Rule 30(b)(6) deposition. 69 Fed. R. Serv. (West) 3d 986, 998 (N.D. Tex. 2007) (citing *Ierardi v. Lorillard, Inc.*, Civ. A. No. 90-7049, 1991 WL 158911, at \*3 (E.D. Pa. Aug. 13, 1991)).

sooner the better.<sup>439</sup> Where incorrect information has been given, as in Corp's corporate representative deposition in which Mr. Smith stated that he had no knowledge of any respiratory protective program during certain years, a more difficult question is presented but one that is not without answer.<sup>440</sup>

The court in *Ierardi v. Lorillard, Inc.* extended by analogy the duty to supplement imposed by Rule 26(e) to Rule 30(b)(6).<sup>441</sup> In *Ierardi*, the court stated the rule that if a corporation takes the position at its Rule 30(b)(6) deposition that it does not know the answers to plaintiff's questions, it cannot later present evidence on those points as would effectively change its answer given at the Rule 30(b)(6) deposition.<sup>442</sup> The court then noted the requirement of Rule 26(e):

Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances . . . .

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.<sup>443</sup>

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<sup>439</sup> See, e.g., *Sinclair & Fendrich*, *supra* note 7, at 679–80 (“If, despite good faith efforts by the entity to prepare its designee, a witness is unable to respond to a specific area of inquiry, the entity has been given leave promptly to designate and prepare a substitute to testify to that area of inquiry. Some courts have stated that the party must do so, and a few courts say the follow-up must take place ‘immediately.’” (citing *Fed. Deposit Ins. Co. v. Butcher*, 116 F.R.D. 196, 199 (E.D. Tenn. 1986), *aff’d by*, 116 F.R.D. 203 (E.D. Tenn. 1987)).

<sup>440</sup> While this testimony was not incorrect, plaintiff certainly took it to be a denial of such a program, which was an incorrect reading of the facts.

<sup>441</sup> Civ. A. No. 90-7049, 1991 WL 158911, at \*3 (E.D. Pa. Aug. 13, 1991).

<sup>442</sup> *Id.*

<sup>443</sup> *Id.* (quoting FED. R. CIV. P. 26(e)(2) (Supp. V 1982) (repealed 1970). The text of Rule 26(e) has since been reorganized and otherwise amended, and now reads, in relevant part:

Whether or not the wording of Rule 26(e)(1) in fact applies to corporate representative depositions of its own force, the extension of the duty (and right) to timely supplement prior responses during a corporate representative deposition works in favor of the corporate party, allowing it to provide additional information as discovery progresses, additional facts are revealed, and theories develop. If the corporation is not able to obtain agreement from counsel or an order from the court deferring the corporate representative deposition until sufficient discovery has been completed to allow full responses to plaintiff's inquiry into facts and interpretations of documents, then the corporation should at least be allowed to supplement its responses as discovery progresses so as to avoid unfair prejudice to its presentation of issues and facts at trial.

Federal Rule 36(b) provides for a motion for leave to withdraw or amend responses to requests for admission: "the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits."<sup>444</sup> Texas Rule 198.3 provides "the [moving] party shows good cause for the withdrawal or amendment; and the court finds that the parties relying upon the . . . admissions will not be unduly prejudiced and that the presentation of the merits . . . will be subserved . . ."<sup>445</sup> The principal difference between the two rules is to whom the burden of persuasion on the issue of prejudice is allocated. If even responses to requests for admission may be withdrawn or amended, it would make sense that Rule 30(b)(6) testimony may be withdrawn, amended or supplemented. Since all courts at least pay lip service to the notion that a corporate representative's testimony is not a

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Supplementing Disclosures and Responses. (1) In General. A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing . . .

FED. R. CIV. P. 26(e)(1). For purposes of this discussion, the rule has changed only in wording, not in substance. *See* FED. R. CIV. P. 26 advisory committee's notes.

<sup>444</sup>FED. R. CIV. P. 36(b).

<sup>445</sup>TEX. R. CIV. P. 198.3(a)–(b).

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judicial admission, even if it is “binding,” the standards for supplementing or amending the responses of the corporate representative should be no more stringent than for supplementing responses to requests for admission.

In the Rule 30(b)(6) deposition of an executive of a multi-national corporation, the corporate representative was questioned about a contract that had been drafted some thirty years earlier. He was fully prepared to respond on each of the topics but tired before the deposition concluded and some of his responses omitted critical information. It was apparent to the corporation immediately after the deposition concluded that it needed to supplement the answers given in order to be certain that no objection could be made to introduction of the additional information at trial. Two things were done by the corporation: (1) a supplemental designation was issued stating that a corporate representative would be made available for deposition on the topics on which the information available to the corporation had been overlooked; and (2) supplemental disclosures were served which filled in the additional information. Counsel for the interrogating party refused to reconvene the corporate representative deposition and stated that he would object to the omitted information being admitted at trial. For a court to reject a good faith effort to provide the information on the designated topics by way of supplementation would ignore the purpose of a Rule 30(b)(6) deposition and promote gamesmanship instead over discovery.

Because of the risk of prejudice from delay, a corporation that learns that its Rule 30(b)(6) testimony was incomplete or inaccurate would be well advised to act promptly in correcting or supplementing same. The same is not true of a Rule 30(b)(1) officer, director or managing agent who simply did not know the answers to some of the questions. Whether or not the witness was someone who should have known the answers is another question.<sup>446</sup>

### 3. Corp Should Not Have Been Barred from Presenting Evidence

Corp should have been free to offer positive evidence regarding its respiratory protection program during the periods Mr. Smith was unaware of, particularly if it gave notice of its intent to supplement the deposition testimony by promptly notifying plaintiff of the designation of an additional witness to cover those other time periods.

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<sup>446</sup> See 2 SCOTT BRISTER ET AL., TEXAS PRETRIAL PRACTICE § 28:249 (2013).



*F. What Protection Does a Corporation Have if Its Opponent Demands Binding Answers Before The Corporation Has Completed Its Investigation?*

1. The Corporate Representative Deposition as a Pre-Emptive Reaction Strike

What if opposing counsel attempts to mount a pre-emptive reaction strike by noticing a Rule 30(b)(6) deposition to inquire into the corporation's position and supporting facts before the corporation has had a full opportunity to understand the case against it, to investigate its position and to be ready to be bound by its answers?

As held in *Detoy v. City and County of San Francisco*, it was improper to instruct a witness not to answer questions in a Rule 30(b)(6) deposition except on the ground of privilege, to enforce a limitation on evidence directed by the court or to present a motion for a protective order.<sup>447</sup> Even the court in *Paparelli* is in agreement.<sup>448</sup> Instead, counsel must seek to delay the deposition by agreement while gathering more complete and accurate information or, failing such, by motion for a protective order delaying the taking of the deposition.<sup>449</sup> If agreement cannot be reached and the court refuses to protect the corporate party from a premature deposition, the only thing one could do would be to designate additional representatives to provide further answers as discovery progresses and the case matures. Federal Rule 30(b)(6) makes it clear that the number of designated representatives necessary to respond to the corporate representative notice is a subject within the control of the presenting party.<sup>450</sup> If it takes more designees to get the full story out, so be it. The consequences can be

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<sup>447</sup> 196 F.R.D. 362, 365–67 (N.D. Cal. 2000); *see also* TEX. R. CIV. P. 199.5(f); *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995), *aff'd by*, 213 F.3d 646 (11th Cir. 2000), *and*, 213 F.3d 647 (11th Cir. 2000); *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989); *Mitsui & Co. (U.S.A.) v. P.R. Water Res. Auth.*, 93 F.R.D. 62, 67 (D.P.R. 1981).

<sup>448</sup> *Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 730–31 (D. Mass. 1985).

<sup>449</sup> *See, e.g., Wollin & Millsom, supra* note 22, at 34–35 (“If, after reviewing all information known or reasonably available, the entity still cannot testify to one or more of the topics in the notice, the entity should so inform the requesting party in advance of the deposition.”).

<sup>450</sup> *See 7 MOORE ET AL., supra* note 16, § 30.25[3], at 30–69 (“If it becomes apparent that a designated deponent cannot satisfy the deposition notice, the organization has a duty to substitute another person.”); *8A WRIGHT ET AL., supra* note 9, § 2103 (“It is . . . the duty of the corporation to name one or more persons who consent to testify on its behalf . . .”).

catastrophic if the disclosures are not made. Since all courts seem to agree that Rule 30(b)(6) deposition testimony does not amount to a judicial admission, supplementation should be freely allowed, as long as it is done timely.

2. Corp Should Move To Amend Its Responses and Designate An Additional Corporate Representative To Respond To Questions with Regard Thereto.

Corp should contact counsel for the discovering party and seek an agreement to postpone the corporate representative deposition until it has had a reasonable opportunity to investigate and prepare its witness. If the discovering party is interested in discovery rather than gamesmanship, it should readily agree. If counsel for the discovering party refuses, then counsel for Corp should move for a protective order to allow the corporation a fair opportunity to prepare witnesses to testify fully and fairly as required. If for some reason the motion is denied, then counsel should endeavor to complete the investigation as quickly as possible and then give notice to opposing counsel of the designation of additional witnesses to testify in response to the original corporate representative deposition notice. Unless agreement is reached that the discovering party will recognize that supplemental designation as effective, a motion for leave to make a supplemental designation should be filed. As noted above, the sooner this is done, the better.

*G. When The Questioner Creates Ambiguity Whether The Designated Representative Speaks for The Corporation as to Certain Questions, What Remedy Is Available to The Corporation?*

The *King v. Pratt & Whitney* court saw “no harm in allowing all relevant questions to be asked at a Rule 30(b)(6) deposition *or any incentive for an examining party to somehow abuse this process.*”<sup>451</sup> It has also been held that there is nothing to prevent the witness from being questioned about properly noticed subjects but as to which the witness was not designated to testify.<sup>452</sup> While it is difficult to argue that the rules adopted in *King and Food Lion* are not initially more efficient, there is much more at

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<sup>451</sup> 161 F.R.D. at 476 (emphasis added). Professor Moore agrees. *See* 7 MOORE ET AL., *supra* note 16, § 30.25[4] n.20.

<sup>452</sup> *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, No. 6:92CV00592, 1996 WL 575946, at \*6 (M.D.N.C. Sept. 6, 1996), *aff'd by*, 951 F. Supp. 1211 (M.D.N.C. 1996).

stake here than superficial efficiency. In fact, great harm may result from allowing an examining party to exceed the scope of the notice or the designation and much incentive to abuse the process. In the end, the interpretation of the rules by the *King* court and others invites gamesmanship and mischief.

As discussed above, some courts have broadly held that a corporate party is bound by the testimony of its corporate representative.<sup>453</sup> The court in *Food Lion* notes that only testimony on matters specified in the Rule 30(b)(6) notice is binding on the corporation.<sup>454</sup> Presumably, testimony as to which a given corporate representative was not designated to testify, even though the subject of a proper Rule 30(b)(6) notice, would not be deemed to “bind” the corporation.<sup>455</sup>

That sounds simple enough but when considered in conjunction with other rulings by the courts discussed above, it clearly creates a trap for the unwary.

### 1. The Need for Clarity and Specificity in The Rule 30(b)(6) Deposition Notice

If a Rule 30(b)(6) notice does not designate the areas to be covered in the deposition with sufficient specificity, the corporation may waste a great deal of time investigating things the questioner really does not intend to cover or may fail to investigate things that are intended to be covered. More importantly, if the Rule 30(b)(6) notice is ambiguous, it will be difficult to determine what areas of a witness’s testimony are within the designation to testify on behalf of the corporation and what are not. This is particularly

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<sup>453</sup> See, e.g., *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 992–93 (E.D. La. 2000), *aff’d by*, 31 Fed. Appx. 151 (5th Cir. 2001); *Rainey v. Am. Forest & Paper Ass’n*, 26 F. Supp. 2d 82, 95 (D.D.C. 1998).

<sup>454</sup> 1996 WL 575946, at \*6 (“A separate witness (Wald) responded to both an individual subpoena and a Rule 30(b)(6) notice. The witness’ testimony is binding on the corporation as to matters specified in the 30(b)(6) notice, but not as to other matters.”).

<sup>455</sup> See *Detoy v. City & Cnty. of S.F.*, 196 F.R.D. 362, 367 (N.D. Cal. 2000) (may cure the statement in the article that there are no cases addressing this proposition as the court cites to the article with approval, noting that counsel may note on the record that the questions have exceeded the scope of the designation and request a limiting instruction prior to trial); Rodger L. Wilson & Steve C. Posner, *Questions Beyond the Scope: Defending Against the Fed. R. Civ. P. 30(b)(6) Sneak Attack*, COLO. LAW, July 1997, at 87, 88 (“[C]ounsel can reasonably argue that the witness’ testimony should bind the designating organization only as to matters on which the witness has been designated to testify, even though there is as yet no case law directly addressing this proposition.”).

troublesome in light of the fact that the courts have held that “reasonable particularity,” and thus the scope of an otherwise ambiguous notice, can be *inferred* from other events in the case<sup>456</sup> or even correspondence between counsel.<sup>457</sup> A corporation may only be bound by testimony on noticed subjects, but what are the noticed subjects? If the scope of the notice, and thus what testimony binds and what does not bind the corporation, may depend on an after-the-fact examination of pleadings, papers, correspondence, and other materials extrinsic to the Rule 30(b)(6) notice, then a corporate representative deposition is truly a high-risk activity.

It has been suggested that corporate counsel can enhance his position in attempting to limit the scope of the inquiry to the subjects as to which a given witness was designated, particularly where other witnesses have been designated to cover other subjects in the notice.<sup>458</sup> While there is obvious logic to the argument, only the *Paparelli* court would seem sympathetic to the argument.<sup>459</sup>

As discussed below, simply attending the deposition and instructing the witness not to answer is not an acceptable remedy under the modern discovery rules. If a Rule 30(b)(6) notice does not sufficiently designate the areas to be covered in the deposition, counsel for the responding party should seek clarification. A first step would be to write counsel for the discovering party asking for clarification. If he is truly interested in discovering what information is available to the corporation, rather than tricking an unprepared witness into damaging (and misleading) admissions, then it is in everyone’s best interest to make clear the subjects to be investigated. If the noticing party refuses to amend or supplement its notice, a motion for protection or to quash under Federal Rule 30(c) would be in order.

If counsel for the corporation has provided written notice in advance of the deposition of the topics on which the corporate representative has been designated to testify, it would seem to be sound practice for the questioner to mark the notice as an exhibit early in the deposition along with the written designation of topics to be addressed by that witness and ask the witness to confirm that those are the areas for which the witness has been

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<sup>456</sup> See, e.g., *Alexander v. F.B.I.*, 186 F.R.D. 137, 139–43 (D.D.C. 1998).

<sup>457</sup> See, e.g., *id.* at 140 (correspondence between counsel); *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989) (Rule 30(b)(6) notice was “subject to a prior clarifying letter so that defendant necessarily knew the scope and nature of plaintiff’s interest.”).

<sup>458</sup> See *Wilson & Posner*, *supra* note 455, at 87–88.

<sup>459</sup> *Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 730–31 (D. Mass. 1985).

designated by the corporation to investigate and respond to questions. If counsel for the corporation has not provided notice in advance, interrogating counsel should, early in the deposition, mark the 30(b)(6) notice as an exhibit and ask the witness to identify the subject matters which he has investigated and to which he will respond to questions on behalf of the corporation. This assumes that the questioner wants to clarify the areas of examination surrounding which answers will be those of the corporation and which will be of the witness individually as a fact witness.

## 2. The Hybrid Corporate Representative/Fact Witness Deposition

What if during the deposition, the examiner seeks to inquire into areas outside the scope of the Rule 30(b)(6) notice in such a way that it will create a dangerously muddled deposition in which fact and representative testimony is so intertwined that it may not be possible to determine which is which, and thus, which is binding and which is not?

In a perfect world, it would not matter in the least. The witness would be all knowing or at least sufficiently savvy to recognize when a question exceeded the scope of the designated subject matter and would make clear in his response that he was testifying based on personal knowledge rather than his investigation on behalf of the corporation. A well-prepared corporate representative would qualify each response to indicate whether he was testifying based on his investigation or on his own recollection. Each answer would then be obvious as to whether it was given in the capacity of a corporate representative or as an individual. In practice, however, a corporate representative, who is at times testifying based on the corporation's investigation and at other times his own memory and beliefs, will leave a dangerously muddled trail.

Suppose for example, the Rule 30(b)(6) notice issued to Corp concerned the company's practices regarding monitoring of its employees' exposure to benzene over a forty year period at all of its locations. Mr. Smith was personally involved in such only during a particular period of time and only at the Atlantis refinery. He has knowledge of other aspects of the company's industrial hygiene program, literature on benzene, etc. but has not conducted an investigation or been advised of the results of the corporation's investigation into those other areas because someone more familiar with them will be designated to address them. During Mr. Smith's deposition, plaintiff's counsel asks questions about the company's monitoring practices at other times, in other locations and with regard to other aspects of the company's plan and knowledge of literature. Because

the witness has not prepared to answer questions in those areas, he can only respond based on his limited information. As a long-term employee, however, he certainly has some understanding regarding the practices at those other plants and at other times. Under the *King* and *Mandelbaum* rules, there is no limit on plaintiff's ability to inquire into Mr. Smith's personal knowledge or into areas identified in the Rule 30(b)(6) notice as to which he was not designated and has not been prepared.<sup>460</sup> While *Mandelbaum* states that the testimony will bind the corporation only to the extent the witness speaks as the designated agent, life is not so simple.<sup>461</sup>

Witnesses routinely have difficulty following instructions not to speculate, and to base their testimony solely on what they know personally, unless specifically asked to provide hearsay information. This seems to be particularly difficult for corporate managers; the more senior, the more difficult. In their daily jobs, managers are required to act based on what their subordinates report to them is going on within their business unit and industry. They make decisions affecting hundreds of millions of dollars every day based on such "hearsay." They report to their superior managers and corporate officers on the same basis. They would not be able to function if in response to a question from senior management about an event they could only respond, "I do not know, I was not there. You need to ask Joe." In a deposition, they are instructed to ignore the reality in which they live and instead, for seven hours, to separate what they "know" from what they have "heard." In their world, such an exercise is both preposterous and pointless.

In a deposition conducted under Rule 30(b)(6), corporate managers are engaged in an exercise much more akin to what they do on a daily basis, report what is known to the organization. If a manager is designated who has both personal knowledge and corporate knowledge based on investigation, the witness will be asked to flip-flop between what comes naturally and what does not, making distinctions between the witness's own personal knowledge and that of the corporation. It is entirely possible, if not probable, that there will be things that he or she saw as a participant to an event one way, but which the corporation, based on a synthesis of observations provided by many different sources, might see another way

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<sup>460</sup> *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995), *aff'd by*, 213 F.3d 646 (11th Cir. 2000), *and*, 213 F.3d 647 (11th Cir. 2000); *Overseas Private Inv. Corp. v. Mandelbaum*, 185 F.R.D. 67, 68–69 (D.D.C. 1999).

<sup>461</sup> 185 F.R.D. at 68–69.

and which, at trial where the perspectives of a number of different witnesses are presented, will be found to be different from the perspective of the single witness who acted as corporate representative. While there may only be one truth, there are many different perspectives and perceptions to events. In this respect, the rule of the binding effect of the testimony of the corporate representative as stated in *Rainey* and *Hyde* is highly unrealistic.<sup>462</sup>

If the examination is not limited to the corporation's investigation of the matters outlined in the Rule 30(b)(6) notice, then part of the testimony will be binding on the organization while other testimony should not be. The problem is, of course, determining which is and which is not. The examiner has no concern in this regard, as it is in his or her best interest to be able to argue that all of the testimony is binding on the corporation. Fuzziness works to the benefit of the interrogator. Since the Rule 30(b)(6) testimony (that based on the organization's investigation rather than the witness's personal knowledge) is admissible against the organization but not for the organization and might not be rebuttable, any ambiguity in characterization of the testimony clearly favors the examining party. Where the rules allow a party who controls the creation of ambiguity to benefit thereby, great harm and unfairness can result.

So what does the presenting attorney do when the corporate representative procedure is being abused? Simply arguing at trial that particular testimony was not within the scope of the witness's designation or not within the scope of the notice and therefore may be rebutted might work, but requires a lot of faith in one's ability to persuade the judge. Is there any other way to protect the record?

This sort of situation was addressed in *Paparelli*.<sup>463</sup> There, when plaintiff's counsel exceeded the scope of the Rule 30(b)(6) notice, counsel for defendant directed the witness not to answer.<sup>464</sup> Even though the court had held that the questions of plaintiff's counsel exceeding the scope of the Rule 30(b)(6) notice were improper, the court held that under Rule 30(c),<sup>465</sup>

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<sup>462</sup>*Rainey v. Am. Forest & Paper Ass'n*, 26 F. Supp. 2d 82, 95 (D.D.C. 1998); *See Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 992–93 (E.D. La. 2000), *aff'd by*, 31 Fed. Appx. 151 (5th Cir. 2001).

<sup>463</sup>*See Paparelli*, 108 F.R.D. at 730–31.

<sup>464</sup>*Id.*

<sup>465</sup>FED. R. CIV. P. 30(c)(2) (“An objection at the time of the examination . . . must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection.”).

as a general rule, instructions not to answer questions at a deposition are improper, except where an answer would cause some serious harm, “i.e., the answer would reveal trade secrets, privileged material, or other confidential material.”<sup>466</sup> Instead of the presenting attorney unilaterally determining the scope of questioning by issuing instructions not to answer, the court held that the proper course is laid out by Federal Rule 30(d)(3), that is, to terminate the deposition and move immediately for a protective order.<sup>467</sup> That Rule provides, *inter alia*, that:

At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.<sup>468</sup>

Thus, the *Paparelli* court found that instructing the witness not to answer was a violation of Rule 30(c) *even though the questions were improper under Rule 30(b)(6)*.<sup>469</sup> Instead, counsel should have terminated the deposition and moved for a protective order.

As Professor Moore has noted,<sup>470</sup> Federal Rule 30 has been amended in 1993, 2000, and 2007, and now provides that:

[A]n objection [to evidence during a deposition] must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation [on evidence] ordered by the court, or to present a motion under Rule 30(d)(3).<sup>471</sup>

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<sup>466</sup> *Paparelli*, 108 F.R.D. at 731; *see also* *Detoy v. City & Cnty. of S.F.*, 196 F.R.D. 362, 365–66 (N.D. Cal. 2000).

<sup>467</sup> *Paparelli*, 108 F.R.D. at 731.

<sup>468</sup> FED. R. CIV. P. 30(d)(3)(A).

<sup>469</sup> 108 F.R.D. at 731.

<sup>470</sup> *See* 7 MOORE ET AL., *supra* note 16, §§ 30.25[1] n.4.2, 30.41[4].

<sup>471</sup> FED. R. CIV. P. 30(c)(2); *see also* *Mitsui & Co. (U.S.A.) v. P.R. Water Res. Auth.*, 93 F.R.D. 62, 67 (D.P.R. 1981) (stating that deposition noticed or conducted in contravention of Rule



However, Rule 30(d)(3)(A) provides broader relief in a motion to terminate or limit the examination: “[a]t any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party . . . .”<sup>472</sup>

Where an examiner repeatedly phrases questions so as to create an ambiguous record whether the response will be as a corporate representative or as an individual fact witness, then the deposition may very well be one which is being conducted in bad faith or in a manner unreasonably to oppress by taking advantage of the self-created ambiguity.

The Northern District of California in fact addressed this very situation in *Detoy v. City and County of San Francisco*.<sup>473</sup> There plaintiff brought suit under 42 U.S.C. § 1983 following the shooting of her daughter by a San Francisco police officer.<sup>474</sup> Plaintiff noticed the Rule 30(b)(6) deposition of defendant.<sup>475</sup> During the deposition, defendant’s counsel instructed the designee not to answer plaintiff’s questions thought to be outside the scope of the notice.<sup>476</sup> Plaintiff moved to compel and defendant moved for a protective order.<sup>477</sup>

The *Detoy* court reviewed the provisions of Federal Rule 30(c),<sup>478</sup> *Paparelli*,<sup>479</sup> *International Union of Electric Radio and Machine Workers, AFL-CIO v. Westinghouse Electric Corporation*,<sup>480</sup> limiting instructions not to answer to those situations in which such instructions are necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under Federal Rule 30(d)(3), that the deposition is being conducted in bad faith or to annoy, embarrass or oppress the deponent or party.<sup>481</sup> The court noted the division between the holdings

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30(b)(6) cannot be challenged by non-cooperation, but only by prior motion for protective order under Rule 26(c), except as to attempts to invade the attorney-client privilege); 8A WRIGHT ET AL., *supra* note 9, § 2035; *Rule 30 Notes, supra* note 910.

<sup>472</sup>FED. R. CIV. P. 30(d)(3)(A).

<sup>473</sup>196 F.R.D. 362, 366–67 (N.D. Cal. 2000).

<sup>474</sup>*Id.* at 364.

<sup>475</sup>*See id.*

<sup>476</sup>*Id.* at 365.

<sup>477</sup>*Id.*

<sup>478</sup>FED. R. CIV. P. 30(c).

<sup>479</sup>*Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 729–30 (D. Mass. 1985).

<sup>480</sup>*See* 91 F.R.D. 277, 278–80 (D.D.C. 1981).

<sup>481</sup>*Detoy*, 196 F.R.D. at 365–66.

of the *Paparelli*,<sup>482</sup> *King*,<sup>483</sup> and *Mandelbaum*<sup>484</sup> courts and found *King* to be the more accurate and logical interpretation of Rule 30(b)(6).<sup>485</sup> Still, the court acknowledged that defending counsel “may fear ambush, and that the designating entity could be bound by the witness’s answers or that the answers could be construed as admissions by the designating entity, or that the questions may enter into territory where the witness is unprepared.”<sup>486</sup> In that regard, counsel for defendant suggested that plaintiff be required to adjourn the deposition so that the witness could appear separately on his own.<sup>487</sup> The court was unpersuaded, despite the acknowledged concerns, in part because such would encourage defending counsel to take a hard line and make the interrogating party use up one of its allotted depositions.<sup>488</sup>

The court directed that if counsel had an objection to a question as falling outside the scope of the Rule 30(b)(6) notice, he was to state the objection on the record as provided by Federal Rule 30(c) and 30(c)(2) (then 30(d)(1)), unless the situation fell within the bounds of Federal Rule 30(d)(3), a deposition being conducted in bad faith or in such a way as unreasonably to annoy, embarrass or oppress the deponent or a party.<sup>489</sup> The court did allow that counsel could note on the record that answers to questions outside the scope of the notice were not intended as answers of the designating party and would not bind that party.<sup>490</sup> The court also suggested that prior to trial, counsel could request from the court

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<sup>482</sup> See 108 F.R.D. at 731.

<sup>483</sup> *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995), *aff’d by*, 213 F.3d 646 (11th Cir. 2000), *and*, 213 F.3d 647 (11th Cir. 2000).

<sup>484</sup> *Overseas Private Inv. Corp. v. Mandelbaum*, 185 F.R.D. 67, 68–69 (D.D.C. 1999) (corporate representative subject to deposition on all information which is relevant or likely to lead to relevant information, limited only by Rule 26(b)(1)).

<sup>485</sup> *Detoy*, 196 F.R.D. at 366–67.

<sup>486</sup> *Id.* at 367.

<sup>487</sup> *Id.*

<sup>488</sup> *Id.* As to the Texas Rules: see TEX. R. CIV. P. 190.2(b)(2) (total time for oral depositions is six hours); TEX. R. CIV. P. 190.3(b)(2) (each side may have no more than 50 hours in oral deposition); TEX. R. CIV. P. 190.4(b) (controlled by Rule 190.2 or 190.3 unless changed by court order); TEX. R. CIV. P. 199.5(c) (six hour per witness limit); TEX. R. CIV. P. 199 cmt. 2 (West Supp. 2002) (“For purposes of Rule 199.5(c), each person designated by an organization under Rule 199.2(b)(1) is a separate witness.”).

<sup>489</sup> *Detoy*, 196 F.R.D. at 367.

<sup>490</sup> *Id.*

instructions to the jury that such answers were merely the answers or opinions of individual fact witnesses, not admissions of the party.<sup>491</sup>

Whether one simply objects to preserve the issue to be dealt with later or terminates and moves for protection will depend on the significance of the testimony/issues and the length to which the examiner goes to create an ambiguous record.<sup>492</sup>

If the objection and notation on the record will be sufficient to cure the problem, then that is probably all that the rules will allow one to do.<sup>493</sup> In other words, where the transgression has not risen to the level of “bad faith” or “unreasonabl[e] oppress[ion],” to use the federal terminology, or “abus[e]” or “for which any answer would be misleading,” to use the Texas terminology, then the less disruptive remedy must be resorted to. Where the

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<sup>491</sup> *Id.* (citing Wilson & Posner, *supra* note 455, at 90).

<sup>492</sup> While there are no reported opinions on the issue, the Texas rules arguably grant broader latitude to counsel to protect the corporate representative from abuse. Rule 199.5(f) provides that “[a]n attorney may instruct a witness not to answer a question . . . only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling” from the court on a motion for protection. TEX. R. CIV. P. 199.5(f). Comment 4 to Rule 199 observes that:

Ordinarily, a witness must answer a question at a deposition subject to the objection. An objection may therefore be inadequate if a question incorporates such unfair assumptions or is worded so that any answer would necessarily be misleading. A witness should not be required to answer whether he has yet ceased conduct he denies ever doing, subject to an objection to form . . . because any answer would necessarily be misleading on account of the way in which the question is put. The witness may be instructed not to answer. Abusive questions include questions that inquire into matters clearly beyond the scope of discovery or that are argumentative, repetitious, or harassing.

TEX. R. CIV. P. 199 cmt. 4 (West Supp. 2002). The comments do not limit the abusive or harassing questions to which a witness may be instructed not to answer to those noted. While presenting counsel should not abuse the latitude given by Rule 199.5(f), that Rule would seem to allow counsel to protect the corporation’s designated representative from abusive or harassing questions which create a misleading record whether they were within the witness’s designation as a corporate representative or not. *See, e.g.*, TEX. R. CIV. P. 199.5(h) (“An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time. An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time.”).

<sup>493</sup> *See, e.g.*, TEX. R. CIV. P. 192.6(a) (“A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege.”).

questioner is truly trying to create a misleading record, then it would seem that a termination of the deposition to allow a motion would be in order. Where travel expenses have been incurred for the witness or opposing counsel, one must be judicious about terminating depositions to allow a motion for protective order unnecessarily lest sanctions be imposed.

Counsel for the presenting party certainly should know from preparation of the corporate representative whether the witness has personal knowledge regarding noticed subject matters for which the witness has not been designated or other personal knowledge. In theory, the easiest way to deal with the problem is to present a witness sufficiently savvy to recognize and state in each instance when answering based on personal knowledge or to otherwise not respond based on the corporation's investigation of a matter on which the witness has been designated.

As suggested by the Court in *Detoy*, in a non-egregious case, counsel for the corporation can protect the record by simply stating an objection.<sup>494</sup> An objection that would seem to comply with the requirements of Rule 30(c)(2) where the question is outside the scope of subject matters identified in the 30(b)(6) notice would be, "Objection, exceeds the scope of the corporate representative notice." Or, where the question is within the scope of the designated subject matters but is on a subject matter this witness was not designated to address, "Objection, exceeds the scope of this witnesses' designation to testify in response to the corporate representative deposition notice."

In a perfect world, the witness will make the objection for counsel by stating something to the effect of the following: "I am sorry, I did not understand that subject to be within the scope of your notice and have not investigated the information available to Corp and thus am not prepared to answer on its behalf today." Of course, in a jurisdiction following *King*, the questioner should follow up by asking whether the witness has any personal knowledge of the subject or has heard any information about it.<sup>495</sup> That sequence of questions leaves a clean record in which everyone will have a clear indication of which answers were within the scope of the notice and bind the corporation and which do not.

If that is not working, then the only remedy left a practical solution is to advise the examiner that the deposition will be terminated and a protective

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<sup>494</sup> 196 F.R.D. at 367.

<sup>495</sup> *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995), *aff'd by*, 213 F.3d 646 (11th Cir. 2000), *and*, 213 F.3d 647 (11th Cir. 2000).

order sought, unless he or she agrees to specify which questions are asked of the witness as a corporate representative and which are asked of the witness based on his or her personal knowledge. Alternatively, an agreement could be reached to ask all the representative questions and personal knowledge questions separately. Such a request would not be unreasonable, although grouping one's questions that way would probably require greater organization on the part of the questioner than a stream of consciousness approach would allow. Federal Rule 26(c) in fact requires that the parties first try to work out the problem between themselves.<sup>496</sup> With all due respect to the *King* court, it is submitted that its observation that there was no "incentive for an examining party to somehow abuse this process" is wrong.<sup>497</sup> There is great incentive for abuse and mischief. Since the courts have hobbled presenting counsel's ability to balance the process, the interrogator has little incentive to agree to ameliorate the opportunity for ambiguity.

If the examiner is truly interested in discovering the truth rather than trying to create an opportunity to take unfair advantage, there should be no objection to any of these approaches.

#### H. Quo Vadis *Federal Rule 30(B)(6)*?

The disclosure obligations now imposed by Federal Rule 26 and some state rules<sup>498</sup> would seem largely to replace much of the abusive use of Rule 30(b)(6) depositions that has developed<sup>499</sup> and to return to the more traditional use—identifying witnesses with knowledge of facts and obtaining a synthesis of the information available to the corporation on

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<sup>496</sup>FED. R. CIV. P. 26(c)(1) ("A party . . . from whom discovery is sought may move for a protective order in the court . . . [but] [t]he motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .").

<sup>497</sup>161 F.R.D. at 476.

<sup>498</sup>FED. R. CIV. P. 26; *see, e.g.*, TEX. R. CIV. P. 194.2 (requiring disclosure of: "(a) the correct names of the parties to the lawsuit; (b) the name, address, and telephone number of any potential parties; (c) [a statement of] the legal theories and, in general, the factual bases of the responding party's claims or defenses . . . ; (d) the amount and any method of calculating economic damages; [and] (e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case . . .").

<sup>499</sup>*See Sinclair & Fendrich, supra* note 7, at 705.

things such as corporate structure and processes.<sup>500</sup> The interrogating party can then efficiently determine which fact witnesses it needs to depose and which it does not. In many respects, much more information can be garnered from the mandatory disclosures without having to argue about attorney-client and work-product privileges.<sup>501</sup> Federal Rule 26(a)(1)(A) requires:

- (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party *may use* to support its claims or defenses, unless the use would be solely for impeachment;
- (ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and *may use* to support its claims or defenses, unless the use would be solely for impeachment;
- (iii) a computation of each category of damages claimed . . . or other evidentiary material, unless privileged or protected from disclosure . . . ; and
- (iv) . . . any insurance agreement . . . .<sup>502</sup>

The Rule 30(b)(6) deposition may, to some extent, be relegated to assisting counsel in discovering complex corporate organizational structures, identifying fact witnesses, and refining the specific role particular corporate employees and agents, past and present, played in the events at issue and who should be deposed with regard thereto.

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<sup>500</sup>See *Report of the Judicial Conference of the United States*, 48 F.R.D. 487 app. 2, at 515 (1969); Sinclair & Fendrich, *supra* note 7, at 660 (“The simple Rule 30(b)(6) procedure was thus conceived as an adjunct to the more common form of direct witness designation, an alternative especially helpful when the discovering party has no knowledge of the internal structure of an opposing entity.”).

<sup>501</sup>See, e.g., Sinclair & Fendrich, *supra* note 7, at 719; Elbein, *supra* note 5, at 377 (“Practitioners should be prepared to offer reasonable alternatives [to corporate representative depositions] which will reveal contentions but protect privilege. Contention interrogatories and ‘regular’ depositions may do the job nicely.”).

<sup>502</sup>FED. R. CIV. P. 26(a)(1)(A)(i)–(iv) (emphasis added).

## V. CONCLUSION

While representative depositions have made it much easier for opposing parties to “cut to the chase,” they do not create a level playing field when individuals and organizations oppose each other. Organization depositions under Federal Rule 30(b)(6) are largely all risk and no gain for the organization presenting the witness. Individual parties, in fact anyone not qualifying as a corporation, organization, partnership or governmental agency, are still free under the rules to “bandy about,” denying personal knowledge and referring their opponents to discovery from others, their experts, etc., while corporations have been held obligated to seek out information even in the hands of third parties and present it to the interrogating party. Where the testimony presented is based on the investigation of the organization rather than the personal knowledge of the deponent, the testimony will be inadmissible on behalf of the organization under Federal Evidence Rule 803, but will be admissible against the organization under Federal Evidence Rules 602 and 802.

Given the consequences of cases holding that the testimony binds the corporation and the ability of the questioner to exceed both the scope of the notice and the scope of the designation, it is critical that counsel presenting a corporate representative seek to get as much particularity in the notice as possible by way of a letter request for clarification or, if necessary, a motion. This is the only way to have a reasonable chance of determining when the questioner has exceeded the scope of the investigation by or for a given representative and as to which he is prepared to testify.

As to the deposition of Corp’s corporate representative, there were a number of errors made in the proceedings. As we have seen, the attempt to force the corporation to present a specific witness in response to a notice of a corporate representative deposition was improper. Moreover, the deposing party had no right to compel the corporation to present a witness with personal knowledge of the subject matters designated. On the other hand, the vast majority of courts to consider the question have held that designation of the corporate representative to testify about certain noticed subject matters in no way limits the scope of examination—the interrogating party is free to question the witness about other matters designated on its notice or about matters not even mentioned in the notice. Even courts that disagree about the absence of limits on the scope of the deposition, do agree that the presenting party may not instruct the witness not to answer but instead must allow the testimony subject to objection or terminate the deposition and seek a protective order. The instruction by

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counsel not to answer was clearly improper. Finally, the court's entry of summary judgment based on the witness's lack of knowledge about the company's respiratory protection program in years other than those for which he was designated to testify was at the very least premature. Corp should be allowed a reasonable amount of time to finish presenting its corporate representatives necessary to complete its testimony on the noticed subjects.